Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

NANCY BOCKES,

Petitioner,

v.

BETTYE LOU FIELDS, Individually and as a member and Chairman of the Board of Social Services, Grayson County, Virginia; ROBERT WELLS, Individually and as a member of the Board of Social Services, Grayson County, Virginia; DENNIS COOLEY, Individually and as a member and Vice-Chairman of the Board of Social Services, Grayson County, Virginia; DEPARTMENT OF SOCIAL SERVICES, GRAYSON COUNTY, VIRGINIA; and COUNTY OF GRAYSON, VIRGINIA,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) WHETHER A COUNTY AGENCY MAY PURCHASE ELEVENTH AMENDMENT IMMUNITY BY PURCHASING LIABILITY INSURANCE FROM THE STATE.

(2) WHETHER THE ACTS OF A VIRGINIA COUNTY'S SOCIAL SERVICES BOARD ARE "POLICY" OF THE COUNTY FOR WHICH THE COUNTY MAY BE HELD LIABLE UNDER 42 U.S.C. § 1983.

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The Opinion of the panel of the United States Court of Appeals for the Fourth Circuit, *Bockes v. Fields*, 999 F.2d 788 (4th Cir. 1993), issued July 26, 1993, is reproduced in the Appendix. A1-A10. The order of the Court of Appeals denying rehearing is reproduced in the Appendix. A28-A29. The order and opinion of the District Court for the Western District of Virginia (Abingdon Division) entering judgment on the verdict against the County of Grayson but granting the motion for judgment as a matter of law in favor of the other defendants, *Bockes v. Fields*, 798 F.Supp. 1219 (W.D.Va. 1992), is reproduced in the Appendix. A11-A27.

JURISDICTION

The petition for rehearing was denied on August 23, 1993. A28-A29. This Court has jurisdiction to review the judgment in question by writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case are:

1. U.S. Constitution Amendment XI:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by

citizens of another State, or by citizens or subjects of any foreign state.

2. VA. CODE § 2.1-526.8:1.

Insurance plans administered by the Department of General Services, Division of Risk Management, for political subdivisions and constitutional officers. – A. The Department of General Services, through its Division of Risk Management, shall establish an insurance plan or plans subject to the approval of the Governor, which may be purchased insurance, self-insurance, or a combination of self-insurance and purchased insurance to provide protection against liability imposed by law for damages and against incidental medical payments resulting from any claim made against any county, city or town, authority, board, commission, sanitation, soil and water, planning or other district, public service corporation owned, operated, or controlled by a locality or local government authority, constitutional officer, affiliate or foundation of a state department, agency or institution, or the officers, agents, or employees of any of the foregoing for acts or omissions of any nature while in an authorized governmental or proprietary capacity and in the course and scope of employment or authorization.

B. Participation in such insurance plan shall be voluntary and shall be approved by the participant's respective governing body or by the State Compensation Board in the case of constitutional officers and by the Department of General Services, Division of Risk Management. Upon such approval, the Division shall assume sole responsibility for plan management, compliance, or removal.

C. The Division of Risk Management shall provide for the legal defense of all participating entities and shall reserve the right to settle or defend claims presented under the plan. All prejudgment settlements shall be approved in advance by the Division of Risk Management.

D. An insurance plan established pursuant to this section shall provide for the establishment of a trust fund for the payment of claims covered under such plan. The funds shall be invested in the manner provided in § 2.1-185 and interest shall be added to the fund as earned.

The trust fund shall also provide for payment of legal defense costs, actuarial costs, administrative costs, contractual costs and all other expenses related to the administration of such plan.

E. The Division of Risk Management shall, in its sole discretion, set the premium and administrative cost to be paid to it for providing an insurance plan established pursuant to this section. The premiums and administrative costs set by the Division shall be payable in the amounts at the time and in the manner that the Division in its sole discretion shall require. The premiums and administrative costs need not be uniform among participants but shall be set so as to best insure the financial stability of the plan.

3. VA. CODE § 15.1-710:

County board of public welfare and superintendent of public welfare. – The board of county supervisors shall select three qualified citizens of the county, one of

whom may be a member of the board of county supervisors, who shall constitute the county board of public welfare. Such board shall, insofar as not inconsistent with this form of government, exercise all powers conferred, and perform all duties imposed, upon county boards of public welfare by law. There also shall be a superintendent of public welfare who shall be chosen by the board of county supervisors, or by the county board of public welfare if the board of county supervisors so provides, from a list of eligibles furnished by the Director of the Department of Social Services. . . .

4. VA. CODE § 63.1-26 [as of 1989, since amended]:

Establishment of entrance and performance standard. – The Board shall establish minimum entrance and performance standards for the personnel employed by the Commissioner, local board and local superintendents in the administration of the succeeding chapters of this title and make necessary rules and regulations to maintain such entrance and performance standards, including such rules and regulations as may be embraced in the development of a system of personnel administration meeting requirements of the federal Health and Human Services under appropriate federal legislation relating to programs administered by the Board; provided, however, the grievance procedure promulgated by the Governor under § 2.1-114.2 shall apply to the personnel employed by the Commissioner and personnel employed by local boards and local superintendents, unless the local governing body elects to include employees of local welfare departments and local welfare boards under the grievance procedure adopted pursuant to § 15.1-71.

5. VA. CODE § 63.1-60:

Appointment of local superintendents and local employees. – Subject to the personnel standards and the rules and regulations of the State Board, the local superintendent shall be appointed by the local board. . . . Subject to the personnel standards, and rules and regulations of the State Board, the local boards or such other appointing authority shall employ, or authorize the local superintendent to employ, such other employees as may be required by the Commissioner to administer this title in the county. . . .

6. VA. CODE § 63.1-61:

Service at the pleasure of the board or superintendent. – The local superintendent and other employees shall serve at the pleasure of the local board, or other appointing authority, subject to the provisions of the merit system plan as defined in § 63.1-87. . . .

7. VA. CODE § 63.1-91:

Local appropriation. – The board of supervisors or other governing body of each county . . . in the Commonwealth shall each year appropriate such sum or sums of money as shall be sufficient to provide for the payment of public assistance and to provide services, including cost of administration, under the provisions of this law within such county. . . . Such governing bodies may also appropriate such sum or sums of money as shall be sufficient to provide for the full range of welfare and social services for children and adults as may be required by federal legislation for reimbursement thereunder. The respective

governing bodies of the counties . . . shall also appropriate such sum or sums of money as shall be sufficient to provide for the foster care of children in the custody or under the supervision of the local boards of public welfare.

8. VA. CODE § 63.1-92:

Reimbursement of localities by the Commonwealth. – . . . Administrative expenditure made by the localities in connection with providing of assistance grants, other benefits and related services, including child welfare, shall be ascertained by the State Board, and the Commissioner shall, within the limits of available federal funds and state appropriations, reimburse monthly each county, city, or district fiscal officer therefor out of such federal and state funds in an amount to be determined by the State Board not less than fifty percent of such administrative costs. . . .

STATEMENT OF THE CASE

Virginia law requires each county to have a department of public welfare or social services. Each department has a governing board whose members are selected by the county. In addition to the county departments, there is a State Department of Social Services, which has five regional offices. In the words of the regional director for twenty-two Southwest Virginia counties, "the Virginia Social Services system is state supervised, locally administered." A43.

In 1990, Nancy Bockes served as Director of the Grayson County, Virginia, Department of Social Services. (The "director of social services" can also be called the "superintendent of public welfare;" *see* VA. CODE § 63.1-59.) The three members of the Grayson County Board of Social Services ("the Local Board") decided to discharge Ms. Bockes. They retained counsel who advised that Ms. Bockes was an at-will employee. After several meetings, and following counsel's advice, the Local Board discharged Ms. Bockes without any prior notice or opportunity to respond to the charges against her. See A44-A46 (testimony of Board member Robert Wells); A46-A48 (testimony of Board member Dennis Cooley); A48-A50 (testimony of Board member Bettye Lou Fields).

Subsequent to her discharge, Ms. Bockes filed a grievance. The three-member grievance panel found for Ms. Bockes and ordered her reinstatement but failed to order restitution of half of Ms. Bockes' lost wages and benefits. While not conceding that Ms. Bockes was entitled to file a grievance, the Local Board reinstated Ms. Bockes but made restitution of only half the lost wages and benefits. Ms. Bockes filed suit under 42 U.S.C. § 1983 in the United States District Court for the Western District of Virginia, on the theory that her right to procedural due process had been violated. The District Court had jurisdiction under 28 U.S.C. § 1343. As defendants, Ms. Bockes named the County of Grayson, Virginia ("the County"); the Grayson County Department of Social Services ("the Local Department"); and the individual members of the Local Board, in their individual and official capacities.

Contrary to the advice received by the members of the Local Board, under Virginia law, Ms. Bockes was not an at-will employee. At trial, the District Court held that although Ms. Bockes had a property interest in her employment and was entitled to pre-termination due process, nevertheless the Local Board members were entitled to qualified immunity and therefore could not be personally liable for Ms. Bockes' damages. A13. A jury determined that Ms. Bockes' damages totaled $20,000. Of this sum, the parties had stipulated that Ms. Bockes' lost wages and benefits totaled approximately $13,000.

Following the trial, the defendants moved for judgment as a matter of law. The District Court entered a memorandum opinion, concluding that the Local Department was an agency of the Commonwealth of Virginia and therefore the Eleventh Amendment of the United States Constitution protected the Local Department and the Local Board from suit in federal court. The District Court also concluded that the acts of the Local Board made the County liable and entered judgment on the verdict against the County. Both Bockes and the County appealed.

The District Court based its conclusion that the Local Board was protected by the Eleventh Amendment largely on its assessment of the Board's liability insurance. The Virginia legislature has authorized the establishment of a liability insurance program for the state's political subdivisions, in which the Local Department participates. The District Court concluded that "of the $20,000 jury verdict in favor of Bockes, the state would be responsible for approximately $13,000. This amount would be paid out of the state's Public Officials Liability Self-Insurance Plan,

which is managed by the Treasurer of Virginia, who holds the money for the plan in a separate insurance fund." 798 F.Supp. at 1223; A20.

The evidence before the District Court included the unrebutted statement by Ms. Bockes that if there was no insurance the County would have to pay a judgment against the Local Department. A34-A35. A letter from the State Department of Social Services at the time of the creation of the liability insurance program indicated that the State would reimburse counties for 80% of the cost of premium payments for the state-run insurance pool but would not pay any of the deductible. A36-A37. An official of the state-run insurance pool gave a statement indicating that all political subdivisions in Virginia are eligible to participate in the insurance plan on a voluntary basis, that different premiums are charged to different entities of different kinds and sizes, and that the payments into the fund are held in a trust fund and invested by the state. A38-A39. After the District Court ruled at the defendants' behest that the Local Board and Local Department were state agencies, Ms. Bockes' counsel received a letter in which the insurance plan asserted that the local department of another county covered by the same insurance program was not a state agency. A40.

The District Court held that "the Local Board's actions, at least as to personnel matters, are fairly attributable to the County Board and, therefore, the County." 798 F.Supp at 1225; A23-A26. Examining the structure of the Local Board, the District Court determined that "because the Local Board exercised authority that it was expressly authorized by law to exercise and because ultimate local control over the Local Board is given to the

County Board, the decision to discharge Bockes is fairly attributable to the County." 798 F.Supp. at 1225; A25. The District Court concluded that the Local Board made policy for the County with respect to social services personnel. As further evidence of the Local Board's policymaking role, the District Court noted a provision from the Local Social Services Board Handbook which described the role of the Local Board as a "policymaker." 798 F.Supp. at 1225 n.7; A26; *see* A41 (Handbook, page 17).

The Court of Appeals ruled against Bockes on both the Eleventh Amendment issue and the issue of the County's liability. The Court of Appeals calculated that $8,400 of the judgment against the Local Board would come from the State's treasury, and concluded therefore that the Eleventh Amendment protected the Board and the Department. 999 F.2d at 790-91; A7-A9. As to the County, the Court of Appeals determined that neither the County itself nor the Local Board has any policymaking authority in the area of social services and the County cannot be liable for the Board's implementation of policy made by the State. 999 F.2d at 791; A9-A10. The Court of Appeals denied Ms. Bockes' petition for rehearing. A28-A29.

REASONS FOR ALLOWANCE OF THE WRIT

(1) THIS COURT SHOULD NOT ALLOW A COUNTY AGENCY TO PURCHASE IMMUNITY UNDER THE ELEVENTH AMENDMENT BY PURCHASING LIABILITY INSURANCE FROM THE STATE.

The District Court and the Court of Appeals were presented with arguments concerning the status of the Grayson County Department of Social Services as a local rather than a state agency. Both courts focused instead on the liability insurance program. The Court of Appeals stated explicitly that it would not consider other facts about the Local Department because of the connection with state funds through the insurance program. 999 F.2d at 790-91, A8-A9.

There is no requirement under Virginia law that the Local Board must purchase insurance from this plan or from any plan or that the Local Board must use state money when purchasing insurance from this plan or any plan. The only connection between state funds and the Local Board's purchase of insurance is that the Local Board is able to obtain reimbursement from the Commonwealth for the administrative funds it expends on insurance. The 80% figure represents the level at which the Commonwealth reimburses the local social services departments for certain administrative expenses, including the purchase of liability insurance. *See* A20, A30-35 (affidavit of Nancy Bockes describing different levels of reimbursement), A36, A39; *see also* VA. CODE §§ 63.1-91, 63.1-92 (localities obtain funds from the state by making local appropriations then seeking reimbursement from the state; administrative costs subject to reimbursement

within the limits of the available state and federal funds). Thus, the holding of the Court of Appeals that the Eleventh Amendment applies is based entirely on the Local Department's willingness to purchase liability insurance from the statutory plan coupled with the Commonwealth's willingness to reimburse the Local Departments for 80% of the cost of their liability insurance premiums.

Without insurance, a judgment against the Local Department or the Local Board would have to be paid by the County and not by the Commonwealth. There is no factual dispute on this point. The only evidence in the record is Ms. Bockes' statement. A34-A35. There is no requirement that the defendants in this case or any other local board participate in the Commonwealth's insurance program for political subdivisions. Participation by these entities in the insurance program "shall be voluntary" and shall be subject to approval of the participant's governing body. VA. CODE § 2.1-526.8:1(B).

The District Court and the Court of Appeals concluded that the Grayson County Social Services Board was protected from suit because, so far as they could tell, the Board purchased liability insurance from the state using state money and a judgment against the Board would come from that insurance plan. This decision was based on assumptions about coverage under the Plan. The insurer itself was not a party to the *Bockes* case and presumably would not have been bound by any discussion of whether or not there was any coverage at all. The Courts noted that there was a policy exclusion for emotional distress damages and that there might be a deductible that would limit coverage. They did not and could

not determine whether the insurer would be liable. *Compare Blaylock v. Schwinden*, 862 F.2d 1352, 1354 n.1 (9th Cir. 1988) ("if the officials desire indemnification under the state statute, they must bring their own action in state court"); *Rubacha v. Coler*, 607 F.Supp. 477, 481 (N.D. Ill. 1985) (no Eleventh Amendment immunity where state's obligation to pay "only consequent upon defendants' liability and [has] no effect on the nature of the principal action"); *McAdoo v. Lane*, 564 F.Supp. 1215, 1219 (N.D.Ill. 19983) ("Since the indemnity statute is enforceable against the state if at all in state court, and since our judgment will in no way compel the state to indemnify plaintiffs, this action is not against the state within the meaning of the eleventh amendment; it is brought only against named individuals and hence is not barred by the amendment.").

Even if the State offered to indemnify Local Department for the entirety of the judgment in this case, with no deductible or exclusions, that payment by the State would not extend the protection of the Eleventh Amendment to the Local Department. The courts of other circuits throughout the country have held uniformly that voluntary indemnification by the State does not make the indemnified party an agent or agency of the State. *See Port Authority Trans-Hudson Corporation v. Feeney*, 495 U.S. 299, 317 n.10 (1990) ("It may be that a simple indemnification clause, without more, does not trigger the doctrine") (Brennan, J., concurring); *Benning v. Board of Regents of Regency Universities*, 928 F.2d 775, 778 (7th Cir. 1991) ("the state cannot manufacture immunity for its employees simply by volunteering to indemnify them"); *Blaylock*, 862 F.2d at 1354; *Gary A. v. New Trier High School Dist. No. 203*, 796 F.2d 940, 945 (7th Cir. 1986) ("A state's decision to

indemnify a state employee or subdivision does not grant that employee or subdivision constitutional immunity"); *Duckworth v. Franzen*, 780 F.2d 645, 650-51 (7th Cir. 1985) ("the purpose of the Eleventh Amendment is only to protect the state against involuntary liability. If the state chooses to pick up the tab for its errant officers, its liability for their torts is voluntary"), *cert. denied*, 479 U.S. 816 (1986); *Wilson v. Beebe*, 770 F.2d 578, 587-88 (6th Cir. 1985) (en banc) ("This obligation is not imposed on the State; it is an obligation voluntarily imposed"); *Spruytte v. Walters*, 753 F.2d 498, 512 n.6 (6th Cir. 1985), *cert denied*, 474 U.S. 1054 (1986); *Demery v. Kupperman*, 735 F.2d 1139, 1146-48 (9th Cir. 1984), *cert. denied*, 469 U.S. 1127 (1985); *Ronwin v. Shapiro*, 657 F.2d 1071, 1074-75 (9th Cir. 1981) (noting the incongruity that would result if a state, "by creating a fund to compensate victims, has somehow extended immunity [to state employees] so as to deny payment to the class of intended beneficiaries"); *Downing v. Williams*, 624 F.2d 612, 626 (5th Cir. 1980), *vacated on other grounds*, 645 F.2d 1226 (1981); *Foster v. Day & Zimmerman*, 502 F.2d 867, 875 (8th Cir. 1974); *Blackburn v. Floyd County Bd. of Educ.*, 749 F.Supp. 159, 163 (E.D.Ky. 1990) ("This principle would apply even if the state fully reimbursed the local board for judgments"); *Schiff v. Kerrigan*, 625 F.Supp. 704, 707 n.7 (D.Conn. 1986); *Rubacha*, 607 F.Supp. at 481; *McAdoo*, 564 F.Supp. at 1219.

The rationale for these decisions comes in part from the Supreme Court's holding in *Edelman v. Taylor*, 415 U.S. 651 (1974), in which the Court concluded that the relief sought was barred by the Eleventh Amendment because "[t]he funds to satisfy the award in this case must inevitably come from the general revenues of the State. . . . " 415

U.S. at 665. In this case, like the other indemnification cases, there is no such "inevitability." The Commonwealth has not gone so far as to indemnify the Local Departments; it has only provided funds for part of their insurance premiums. The only conceivable burden that a judgment against the Local Department would have on the general revenues of Virginia would be if there was some connection between the judgment and the reimbursement of insurance premiums. Because the insurance program itself is voluntary, it is not true that a judgment against a local department would "inevitably" have any connection with funds from the state. Moreover, a judgment against the Local Department and Board does not determine the liability of the insurance pool nor does it require any state agency to pay any money.

The Court of Appeals' decision does not mention the indemnification cases, nor does it cite any authority for the proposition that a state's contribution to the funds with which a government body may choose to pay liability insurance premium payments renders that government body an arm of the state for purposes of the Eleventh Amendment. The analysis of the Court of Appeals does not go beyond recognition that in some manner state funds are involved and therefore the Eleventh Amendment must apply. The courts in the indemnification cases cited above recognized that even though state funds would be used to satisfy the judgment because of the state's decision to provide indemnification, nevertheless the state actors were not protected by the Eleventh Amendment.

In other words, the mere fact that funds originating with the revenues of the state may ultimately be applied

to satisfy a defendant's judgment does not transform that defendant into a state agent. Under the Court of Appeals' decision, any political subdivision in the Commonwealth which buys into the insurance plan of section 2.1-526.8:1 is a state agency protected by the Eleventh Amendment, regardless of any other facts about the connection between the entity and the Commonwealth. Because the Commonwealth makes some contributions to the insurance pool if by no way other than indirectly through entities like the social services departments, any payments from the insurance pool for claims against any municipal entity would involve some payment of funds from the Commonwealth.

There are other county social services boards that have not purchased such insurance. The decision of the District Court and the Court of Appeals creates the potential that some county social services boards in Virginia will be protected by the Eleventh Amendment and others who have not made the same arrangements for liability insurance will not. This possibility is demonstrated by the case of *Holland v. Rimmer,* Docket No. 93-1447, now pending before the United States Court of Appeals for the Fourth Circuit.

In that case, the plaintiff was discharged as director of social services for Buchanan County, Virginia. Summary judgment was entered in favor of the defendants, Buchanan County and the members of the Buchanan County, Virginia Board of Social Services. On appeal, the plaintiff Holland has asserted that the Eleventh Amendment does not protect the Buchanan County board and that *Bockes* does not apply because the Buchanan County

department did not participate in the state-run liability insurance pool, unlike Grayson County Social Services.

Municipal agencies should not be in a position to determine for themselves by their purchase of insurance whether they should be protected by the Eleventh Amendment. Because the local social services departments are free to purchase insurance from other sources, it cannot be said that the liability of the local social services board must be "inevitably" be paid by the state. To the contrary, the undisputed evidence in this case is that but for the fortunate choice to participate in the government insurance pool, a judgment in this case would have been paid by the County and not the State. A34-A35 (affidavit of Ms. Bockes that the County would be liable); *see* A36 (statement from head of State Department of Social Services that the State will make no reimbursement for any deductible amounts under the insurance plan). Neither the District Court nor the Court of Appeals took note of this fact, which would appear to establish that the unfortunate county social services departments which do not join in the state-run pool may not be protected by the Eleventh Amendment. The Court of Appeals' reliance on its calculation of the amount of state dollars involved suggests that if Ms. Bockes had obtained a smaller verdict that was less than the deductible or was excluded from coverage under the policy, such that the insurance plan would make no payment at all, then the Eleventh Amendment might not apply.

The government entities who may participate in the plan are not limited to those which are funded like the social services departments, but include counties, cities

and towns and other political subdivisions of the Commonwealth which would not be funded by the state or protected by the Eleventh Amendment. A38; *see* VA. CODE § 2.1-526.8:1(A). Eligible participants include "any county, city or town, authority, board, commission, sanitation, soil and water planning or other district, public service corporation owned, operated or controlled by a locality or local government authority, constitutional officer, affiliate or foundation of a state department, agency or institution, or the officers, agents or employees of any of the foregoing for acts or omissions of any nature while in an authorized governmental or proprietary capacity and in the course and scope of employment or authorization. VA. CODE § 2.1-526.8:1(A). A separate statute creates a liability insurance program for state agencies, departments, and officials. *See* VA. CODE § 2.1-526.8.

The decision of the Court of Appeals analyzes the insurance program in a single paragraph. 999 F.2d at 790; A7-A8. It makes no mention of any of the provisions of VA. CODE § 2.1-526.8:1. In complete disregard of the provisions of section 2.1-526.8:1(A), the Court of Appeals offers the conclusion that the Commonwealth pays 80% of the premiums that fund the insurance plan. There was no basis in the record for the Court to conclude that 80% of the money paid into the state-run plan came from the Commonwealth. To the contrary, the state statute creating the plan indicates that it was created for all variety of political subdivisions, including counties and towns and other entities that may or may not receive state funding that could be applied to insurance premiums. A38 ("All

political subdivisions in Virginia are eligible to participate in the Plan.") The trust fund also includes the earnings from the investment of the premiums. A39. The only direct payments from the Commonwealth to the plan are for the coverage of constitution officers. VA. CODE § 2.1-526.8:1(B). The other funds come from various political subdivisions and other government bodies which are eligible to participate in the plan and the statute contemplates that Division of Risk Management may, for example, charge higher premiums to larger entities that might generate more claims. A38-A39 (description of plan from Division of Risk Management); *see* VA. CODE § 2.1-526.8:1.

The courts of other circuits and the Fourth Circuit have recognized that the Eleventh Amendment may not prohibit a judgment that will be satisfied from a state-held fund that is segregated from the general revenues and made up of substantial contributions of non-state funds. *See Paschal v. Didrickson*, 112 S.Ct. 992 (1992) (White, J., dissenting) (describing the different circuit court opinions on the question of whether retrospective relief against a separate state fund would be barred by the Eleventh Amendment); *Almond v. Boyles*, 612 F.Supp. 223, 227 (E.D.N.C. 1985), vacated in part on other grounds, 792 F.2d 451 (4th Cir. 1986). With respect to a judgment against the Local Board that would be paid out of funds held by the Virginia insurance pool for political subdivisions, there would be no drain on the general revenues of the Commonwealth. The statute provides that the assets of the insurance plan are to be placed in a trust fund to be used for payment of claims and administration of the plan, not any other purpose: the money in the trust fund is not in any way "general revenue funds."

VA. CODE § 2.1-526.8:1(D). The insurance pool contains only money paid into it as premiums, including premiums from non-state entities like cities, counties, and towns. The statute provides explicitly that the financial stability of the plan is to be maintained not by the additional appropriation of state funds but by the adjustment of the premiums and administrative costs charged to the participants. VA. CODE § 2.1-526.8:1(E).

Finally, the Court of Appeals' decision precludes consideration of other facts about the relationship between the Local Board and the Commonwealth. Perhaps the most important of these is that even after the District Court determined that the Local Department was a state agency and the counsel for the Local Department and its Board had argued in briefs and at oral argument that they were state agents, the Division of Risk Management which administers this insurance program has taken the position that county departments of social services are not state agencies for purposes of the Virginia Tort Claims Act. *See* A40 ("We are of the opinion that the Buchanan County Department of Social Services is not a State agency for the purposes of the Tort Claims Act.") If the Court of Appeals' decision is not reversed, this two-headed position by the Division of Risk Management allows the Local Departments who participate in the political subdivision insurance plan administered by the Division the best of both worlds: a Local Department could not be sued in state court because it is not a state agency as to which sovereign immunity has been waived, yet at the same time it could not be sued in federal court because it is a state agency protected by the Eleventh Amendment.

(2) THE COURT SHOULD RECOGNIZE THAT THE ACTS OF A VIRGINIA COUNTY'S SOCIAL SERVICES BOARD ARE "POLICY" OF THE COUNTY FOR WHICH THE COUNTY MAY BE HELD LIABLE UNDER 42 U.S.C. § 1983.

The Court of Appeals determined that the County could not be liable for the acts of the Local Board because it found that the Local Board was not a "policymaker" for the County. Under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), municipal liability attaches when the deprivation results from the implementation or execution of municipal policy or custom, "whether made by its lawmakers or by those whose edicts or acts may be said to represent official policy." 436 U.S. at 694. A single decision by an official with policymaking authority can be the basis for municipal liability. *See Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). State law defines who the policymakers are. *City of St. Louis v. Prapotnik*, 485 U.S. 112, 124 (1988).

The District Court concluded that "the Local Board's actions, at least as to personnel matters, are fairly attributable to the County Board and, therefore, the County." 798 F.Supp. at 1225. Examining the structure of the Local Board, the District Court determined that "because the Local Board exercised authority that it was expressly authorized by law to exercise and because ultimate local control over the Local Board is given to the County Board, the decision to discharge Bockes is fairly attributable to the County." 798 F.Supp. at 1225. The Court of Appeals reversed this decision, concluding that the Commonwealth makes all the policy for social services in

Virginia and the Local Board acts only within the circumscribed discretion it is allowed by the Commonwealth.

This conclusion cannot be reconciled with the state law which defines what the Local Board is and what it does. The Local Board is a decision-making body; its sole function is to make policy. It is a social services policymaker for the County. It oversees the Local Department, deciding what programs will be offered and how they will be budgeted. The Local Department is a part of the County government; the County's Board of Supervisors and the Local Board are its policymakers. Consequently, the County should be liable for the acts of the Local Board, which define the policy of the County as to the matters within the scope of the authority of the Local Board.

The Virginia Code in dealing with counties specifically assigns particular activities to particular offices or departments, and the function of providing social services shall be handled by a Local Department. *See* VA. CODE §§ 15.1-703 – 15.1-720 (assigning responsibilities for the county administrator, the Commonwealth's attorney, county clerk, sheriff, commissioner of revenue, treasurer, county school board, county board of health, county board and director of social services, and the county purchasing agent). The County has specific oversight powers with respect to the activities of the Local Department, the Local Board, and the other agencies of the County. *See* VA. CODE §§ 15.1-701(b) (county may require annual and other reports), 15.1-701(c) (county may investigate any office or officer); 15.1-703 (assignment of activities); 15.1-705 (examination by county administrator of department books); 15.1-714 (schedule of compensation);

15.1-715 (bond requirement for officers); 15.1-716 (auditing of accounts and books). As to Local Departments in particular, the County Board of Supervisors is responsible for the membership of the local social services Board, funding for activities and operations of the Local Board and the Local Department, and compensation of the Director of the Local Department. *See* VA. CODE §§ 63.1-40 (how local board for a single county constituted; local board to include one member of the County Board of Supervisors), 63.1-45 (suspension or removal of local board members), 63.1-47 (compensation and expenses of the local board), 63.1-66 (compensation of the director and other employees), and 63.1-91 ("The Board of Supervisors . . . shall each year appropriate such sum or sums of money as shall be sufficient to provide for the payment of public assistance and to provide services, including the cost of administration, under the provisions of this law within such county. . . . "). These statutes support the District Court's conclusion that the County controlled the Local Board.

Likewise, the District Court correctly observed that the Local Board is a policymaker for the County in the area of social services. As noted by the District Court, the day-to-day business of social services is left to the Local Board and the Local Department. The role of the Local Board is to make policy decisions, which are then implemented by the director and the employees of the Local Department. The Local Board is not required to meet more frequently than six times a year. VA. CODE § 63.1-48. The Virginia Code allows the Local Board to determine the budgets, employ counsel for advice, select programs and methods of providing programs, determine how

money from private donations will be used, to appoint and direct the superintendent or director of the county department, and to fix the salaries of the director and other employees of the department. VA. CODE §§ 63.1-51 (local board determines use of private funds); 63.1-54 (local board determines budget); 63.1-54.1 (local board may retain counsel); 63.1-55 (local board has choice of providing or purchasing child welfare services); 63.1-55.1:1 (local board has choice of providing adult foster home services); 63.1-56.1 (local board has choice of providing children's group homes); 63.1-57.1 (local board to direct activities of social services director); 63.1-60 (local board appoints director); 63.1-66 (local board determines compensation); 63.1-106 (local board has option to establish general relief program); 63.1-183.1 (local board has choice of providing homes for the aged).

Contrary to the Court of Appeals' conclusion, the Local Board does set general goals and programs. State regulations may control how certain programs will be executed, but the Local Board decides the character and scale of the overall provision of social services in the county. There are no state regulations or laws which direct the Local Board in deciding whether it should establish a general relief program or an adult foster home or a children's group home or a home for the aged. Likewise, the County itself does not control these questions, but is bound by the decisions of the Local Board. The "purely operational aspects" of running the Local Department are handled by the Director and the employees of the Local Department. The Local Board with its bi-monthly meetings does not execute or operate the welfare or food stamps or general relief or any of the

other programs of the Local Department; its role is limited to making policy for the County.

With respect to the discharge of a director of social services, state law and regulations confer final authority on the Local Board. *See* VA. CODE §§ 15.1-710, 63.1-60, and 63.1-61; 798 F.Supp. at 1225 n.7. ("According to the terms of Volume IA, a publication of the Virginia Department, the Local Board is the 'appointing authority for all personnel actions.' Volume IA, Chapter A at 11.") The Local Board's decision to discharge Ms. Bockes was the final decision of the County and not subject to review by the County or any state office. The Local Board's authority to make the final decision was conferred not merely by custom, but by law.

Under these statutes, the decision of the Local Board *was* the decision of the County. *Compare Soderbeck v. Burnett County, Wis.*, 752 F.2d 285 (7th Cir. 1985). In *Soderbeck*, the court observed:

> The basis on which [the plaintiff] tried to implicate the county in the sheriff's wrongdoing was . . . the involvement of the members of the county's Law Enforcement Committee. The governing body of the county is its Board of Supervisors, which operates through committees. The Law Enforcement Committee is one, and it is in charge of the budget for the sheriff's department. . . . [T]he committee unquestionably is a policy-making body whose acts are the county's acts for purposes of section 1983.

752 F.2d at 293. *See Shelton v. City of College Station*, 754 F.2d 1251, 1257 (5th Cir. 1985) ("the defendant city is liable for injury inflicted by unconstitutional acts of its

zoning adjustment board, for the city lawmakers had delegated exclusive policy-making authority to that Board with regard to the grant or denial of variances from the city's zoning regulations . . . the Board . . . is the sole municipal authority by which variances from the general municipal ordinance may be granted"). Similarly, in social services matters, the Local Board "unquestionably is a policymaking body whose acts are the county's acts for purposes of section 1983."

As noted by the District Court, the Handbook for Local Boards discusses Local Boards as policymaking bodies. A41. It is difficult to understand the role of the Local Board as other than a policymaker. It meets periodically; its members receive little in the way of compensation; it has little or no involvement with the cases handled by the employees of the Local Department. The Local Board is a policymaker, deciding budgets, selecting programs, determining the larger questions of policy while the tasks of administration are performed by the employees of the Local Department.

The County may be liable under *Monell* because the Local Board in itself was the final authority with respect to Ms. Bockes' discharge. *See Prapotnik*, 485 U.S at 127 ("the authority to make municipal policy is necessarily the authority to make *final* policy"); Annotation, "What constitutes policy or custom for purposes of determining liability of local government unit under 42 U.S.C. § 1983," 81 ALR Fed. 550, § 11[a] (collecting cases in which municipalities were liable for the decisions of individuals or groups who had final authority over the discharge of the plaintiffs). The County has never tried to argue that the decision made by the Local Board was not final, that Ms.

Bockes had some additional recourse to the County before her discharge would take effect. Even if the District Court overstated the role of the County, it reached the right result in concluding that the Board's decision was the final word for the County on Ms. Bockes' discharge.

The Panel's decision suggests that the only "policy" at issue here is contained in the personnel policy defined by the State Board under VA. CODE § 63.1-26. In *Prapotnik*, there was no majority opinion, yet both the group joining in Justice O'Connor's opinion and the group joining in the concurring opinion of Justice Brennan, including a total of seven justices, agreed that when a municipality's actual practices differ from its expressly stated policies, the practices represent the actual policy. 485 U.S. at 130-31, 145 n.7. Thus, a declared municipal policy against employment discrimination would not insulate the city from liability for the consequences of discriminatory practices. Similarly, in this case, the state personnel manual cannot insulate the County from liability for the official action of the Board in discharging Ms. Bockes without a pre-termination hearing.

The State Department of Social Services does have its own regional offices and employees, like Ms. Brunty, who testified at the trial. A43. The employees of the local Departments are not employees of the State. *See* VA. CODE § 63.1-60; 1985-86 Report of the Virginia Attorney General at 342. The provisions of Title 15.1 for the different types of counties make plain that a local social services board is in fact an agency of the county. VA. CODE §§ 15.1-604, 15.1-639, 15.1-710, and 15.1-765 (counties). Employees of the Local Department are county employees in every

respect. A30, A32-34 (affidavit of Nancy Bockes describing indicia of the status of Local Department employees as County employees). The Local Board, and not the State, makes policy for the County with respect to social services personnel.

The actual facts of the case support the conclusion that the Board's act in discharging Ms. Bockes was the implementation of official policy. The way in which Ms. Bockes' discharge was accomplished has all the markings of policymaking, not execution of policy. The three members of the Board met and determined that Ms. Bockes should be discharged. They consulted with counsel at least three times to decide what its policy would be in discharging Ms. Bockes. A44-A50 (testimony of the three board members). The Board made a policy decision as to how a director would be fired. They decided that Ms. Bockes was not entitled to the protections of the grievance procedure. Acting as the "officials responsible for establishing final policy with respect to the subject matter in question," the Board made "a deliberate choice from among various alternatives," determined not to give Ms. Bockes a hearing, and discharged her. *Compare Pembaur,* 475 U.S. at 483-84. Ms. Bockes' discharge was in turn the implementation or execution of this policy decision.

CONCLUSION

The Fourth Circuit erred in concluding that the Local Department and the Local Board are protected by the Eleventh Amendment. It also erred in concluding that the acts of the Local Board were not policy on which the

liability of the County could be based. For these reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

KURT J. POMRENKE
Attorney for Petitioner

DATED: November 22, 1993

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NANCY BOCKES, *Plaintiff-Appellant,* v. BETTYE LOU FIELDS, Individually and as a member and Chairman of the Board of Social Services, Grayson County, Virginia; ROBERT WELLS, Individually and as a member of the Board of Social Services, Grayson County, Virginia; DENNIS COOLEY, Individually and as a member and Vice-Chairman of the Board of Social Services, Grayson County, Virginia; DEPARTMENT OF SOCIAL SERVICES, Grayson County, Virginia, *Defendants-Appellees.* and COUNTY OF GRAYSON, VIRGINIA, *Defendant.*	No. 92-2047

NANCY BOCKES,

Plaintiff-Appellee,

v.

COUNTY OF GRAYSON, VIRGINIA,

Defendant-Appellant,

and

Bettye Lou Fields, Individually and as a member and Chairman of the Board of Social Services, Grayson County, Virginia; ROBERT WELLS, Individually and as a member of the Board of Social Services, Grayson County, Virginia; DENNIS COOLEY, Individually and as a member and Vice-Chairman of the Board of Social Services, Grayson County, Virginia; DEPARTMENT OF SOCIAL SERVICES, Grayson County, Virginia,

Defendants.

No. 92-2072

Appeals from the United States District Court
for the Western District of Virginia, at Abingdon.
Samuel G. Wilson, District Judge.
(CA-91-62-A)

Argued: June 8, 1993

Decided: July 26, 1993

Before WILKINSON, Circuit Judge, SPROUSE, Senior Circuit Judge, and G. ROSS ANDERSON, JR., United States

District Judge for the District of South Carolina, sitting by designation.

Affirmed in part, reversed in part, and remanded with instructions to dismiss by published opinion. Judge Wilkinson wrote the opinion, in which Senior Judge Sprouse and Judge Anderson joined.

COUNSEL

ARGUED: Kurt Joseph Pomrenke, WHITE, ELLIOTT & BUNDY, P.C., Bristol, Virginia, for Appellant. Robert Vincent Ward, LAW OFFICES OF ROBERT V. WARD, P.C., Bristol, Virginia, for Appellees. **ON BRIEF:** Steven R. Minor, WHITE, ELLIOTT & BUNDY, P.C., Bristol, Virginia, for Appellant.

OPINION

WILKINSON, Circuit Judge:

This case poses two questions about the amenability of governmental bodies to suit in federal court – here an action claiming termination from employment without due process. The first question is whether the Board of Social Services for Grayson County, Virginia and the Department of Social Services for Grayson County are state entities, and thus immune from suit in federal court under the Eleventh Amendment. We hold that they are immune, because their liability to plaintiff would be covered by an insurance plan funded by the state. The second question is whether Grayson County can be held responsible under 42 U.S.C. § 1983 for the personnel decisions of the Board. We hold that it cannot, because

the Board did not dismiss plaintiff pursuant to any County policy. We accordingly affirm the district court on the first question, reverse it on the second question, and remand with instructions that plaintiff's claim be dismissed. Plaintiff must be satisfied with the extensive grievance procedures provided by the Commonwealth of Virginia, which she has already pursued with some success.

I.

The Commonwealth of Virginia has established a complicated scheme for administering its social services programs. At the top is the Commissioner of Social Services, who is appointed by the Governor of Virginia. Va. Code § 63.1-2. The Commissioner manages the Department of Social Services for the entire state. *Id.* at § 63.1-1.1. A nine-member State Board of Social Services, also appointed by the Governor, advises the Commissioner. *Id.* at §§ 63.1-14, 63.1-24.

The counties and cities in Virginia have local departments of social services as well, which help to implement the programs enacted by the Commonwealth. Va. Code § 63.1-38.1. The local departments are overseen by local boards of social services, which are appointed by the counties or cities. *Id.* at §§ 63.1-38, 63.1-38.1. The local board selects a local director, who administers social services on a day-to-day basis. *Id.* at §§ 63.1-59, 63.1-60.

The Commissioner and State Board of Social Services retain ultimate authority over personnel decisions at both the state and local level, however. The State Board has the duty to "establish minimum entrance and performance

standards for the personnel employed by the Commissioner, local boards and local superintendents." Va. Code § 63.1-26. The Commissioner is required to "remove each employee who does not meet such standards." *Id.* at § 63.1-37. While local department employees "serve at the pleasure of the local board," the local board must adhere to guidelines promulgated by the State Board when it hires and fires personnel. *Id.* at § 63.1-61. "Members of any local board may be suspended or removed for cause by the State Board." *Id.* at § 63.1-45.

Plaintiff Nancy Bockes served for thirteen years as Director of the Grayson County Department of Social Services (the "Department"). In June of 1990, she was fired by the Grayson County Board of Social Services (the "Board"), without notice and without a pre-termination hearing. She then filed a grievance, using procedures prescribed by the Virginia Department of Social Services. A grievance panel ordered the Board to reinstate her as Director and to give her one-half backpay for the period during which she had no job.

Dissatisfied with the award, Bockes filed this § 1983 action seeking the other half of her backpay, plus damages for pain and suffering. She named the members of the Board as defendants, both in their individual and official capacities. She also named the Department and the County itself.

Bockes' case ultimately went to trial. At the close of the evidence on liability, the district court ruled that Bockes' position as Director was "permanent," and thus that the Fourteenth Amendment required the Board to

have given her a pre-termination hearing.[1] The court submitted the issue of damages to the jury, which awarded Ms. Bockes a total of $20,000: $13,000 for lost wages and benefits; $7,000 for pain and suffering.

The Board and the Department maintained that they were immune from suit in federal court because they were state entities under the Eleventh Amendment. The County maintained that it was not liable because the Board had not fired Ms. Bockes pursuant to any County policy. The district court granted judgment as a matter of law both to the Board and to the Department, agreeing that they were immune from suit under the Eleventh Amendment. *Bockes v. Fields*, 798 F. Supp. 1219, 1222-24 (W.D. Va. 1992). The court upheld the $20,000 verdict against the County, however, ruling that the Board's firing of Ms. Bockes was an official policymaking act attributable to the County. *Id.* at 1224-26.

Both sides appeal this judgment. Bockes appeals the ruling that the Board and the Department are immune from suit. The County cross-appeals the ruling that it is liable for the acts of the Board. All defendants maintain alternatively that the district court erred in ruling that Ms. Bockes was denied due process. We shall address each issue in turn.

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[1] The court also ruled that the Board members had qualified immunity in their individual capacities. Bockes does not appeal this ruling.

II.

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state." U.S. Const. amend. XI. This Amendment serves to curb overreaching by the federal judiciary into the internal affairs of a sovereign state. While the Eleventh Amendment on its face applies only to suits by citizens of a foreign state, it is now well established that an unconsenting state is immune from suits in federal court brought by its own citizens as well. *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974); *Hans v. Louisiana*, 134 U.S. 1 (1890). It is also well established that this immunity extends to state agencies and officials, when a monetary judgment against them would be paid from the state treasury. "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). "Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Edelman*, 415 U.S. at 663.

In this case, were we to hold the Board and the Department liable to Ms. Bockes, a substantial portion of that liability would be paid by the Commonwealth of Virginia. The Board and the Department subscribe to the Commonwealth's Public Officials Liability Self-Insurance Plan. Under this Plan, the Treasurer of Virginia manages a

separate trust fund which covers liability that subscribing agencies incur in the discharge of their duties. The Commonwealth pays 80% of the premiums that fund this Plan; the agencies the other 20%. Of the $20,000 judgment against the Board and the Department, the Plan would cover $10,500: $13,000 for Bockes' lost wages and benefits,[2] minus a $2,500 deductible.[3] And since the Commonwealth funds 80% of the Plan, 80% of this $10,500, or $8,400, would come ultimately from the Virginia treasury. The Eleventh Amendment bars this recovery.

Ms. Bockes attempt to avoid this conclusion. She asks us to consider other factors that this court has previously identified as relevant to determining whether an agency is a state entity for Eleventh Amendment purposes: the characterization of the agency under state law; the extent of state control over the agency; and the dependence of the agency on state appropriations. *See Keller v. Prince George's County*, 827 F.2d 952, 964 (4th Cir. 1987); *Ram Ditta v. Maryland Nat'l Capital Park & Planning Comm'n*, 822 F.2d 456, 457-58 (4th Cir. 1987). Certainly these factors should be considered in actions that seek remedies other than damages from state treasuries. *See, e.g., Ram Ditta*, 822 F.2d at 458-60 (considering other factors after determining that judgment against Planning Commission would not be paid from Maryland treasury). When the

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[2] The Plan does not cover Ms. Bockes' damages for mental anguish.

[3] It is not clear from the record whether the deductible would apply to this particular claim. We assume *arguendo* that it does.

action seeks damages that would be satisfied by state funds, however, no further inquiry is necessary.

We thus conclude that the Board and the Department are immune from suit in federal court by Ms. Bockes. That the Commonwealth would pay only part of the judgment against these defendants does not restrict our holding. Defendants' Eleventh Amendment immunity cannot turn on whether Bockes seeks damages for emotional distress, or other damages ancillary to her core claim that defendants denied her due process. The insurance plan funded by the Commonwealth covers this core claim. The Eleventh Amendment therefore bars the suit.

III.

Under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), a county may be liable for acts done pursuant to its "policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Id.* at 694. The district court found the Board's firing of Ms. Bockes to represent the "official policy" of Grayson County, because the County had the power to hire and fire the members of the Board. The County argues that this analysis is misfocused, because the Commonwealth, not the County, sets personnel policy for the Board.

We agree with the County. The relevant question is whether the Board acted as the County's designated "policymaking authority" when it fired Nancy Bockes. " '[P]olicymaking authority' implies authority to set and implement general goals and programs of municipal government, as opposed to discretionary authority in purely

operational aspects of government." *Spell v. McDaniel*, 824 F.2d 1380, 1386 (4th Cir. 1987). In Virginia, neither the County nor the local boards have authority to set "general goals and programs" for social services personnel; that authority is reserved for the State Board. *See* Va. Code §§ 63.1-26. The State Board has wielded this authority by publishing a comprehensive personnel handbook, which the local boards must follow. Among other things, this handbook requires the local boards to apply merit criteria in their personnel decisions. It even prescribes the grievance procedure that Ms. Bockes used in this case. In short, the Grayson County Board enjoyed its discretion to fire Ms. Bockes at the prerogative of and within the constraints imposed by the Commonwealth. Such bounded, state-conferred discretion is not the "policymaking authority" for which a county may be held responsible under § 1983.

IV.

In sum, we hold that the Board and the Department are immune from suit in federal court, and that the County is not liable for the actions of the Board. We thus need not address whether Ms. Bockes was deprived of due process by being fired without a pre-termination hearing, because none of the defendants are amenable to federal suit. Ms. Bockes must settle for the remedy afforded her by state law. The judgment of the district court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS TO DISMISS.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

NANCY BOCKES, Plaintiff, v. BETTYE LOU FIELDS, ROBERT WELLS, AND DENNIS COOLEY, individually and in their official capacities as members of the Board of Social Services, Grayson County, Virginia, DEPARTMENT OF SOCIAL SERVICES, GRAYSON COUNTY, VIRGINIA, and COUNTY OF GRAYSON, VIRGINIA, Defendants.	Civil Action No. 91-0062-A **FINAL ORDER** (Filed July 30, 1992)

In accordance with the court's rulings at trial and the court's memorandum opinion entered on this date, it is ADJUDGED and ORDERED that judgment be entered in favor of plaintiff, Nancy Bockes, and against defendant, Grayson County, Virginia, in the amount of $20,000, and that judgment be and the same is, hereby, entered in favor of defendants, the Department of Social Services of Grayson County, Virginia, and Bettye Lou Fields, Robert Wells, and Dennis Cooley in their individual and official capacities as members of the Board of Social Services of Grayson County, Virginia, and this case is ORDERED stricken from the docket of the court.

ENTER this 29th day of July, 1992.

/s/ Illegible
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

NANCY BOCKES,

Plaintiff,

v.

BETTYE LOU FIELDS, ROBERT WELLS, AND DENNIS COOLEY, individually and in their official capacities as members of the Board of Social Services, Grayson County, Virginia, DEPARTMENT OF SOCIAL SERVICES, GRAYSON COUNTY, VIRGINIA, and COUNTY OF GRAYSON, VIRGINIA,

Defendants.

Civil Action No. 91-0062-A

MEMORANDUM OPINION

(Filed July 30, 1992)

After thirteen years as Director of Social Services of Grayson County, Virginia, a position classified as "permanent" by the Department of Social Services personnel manual, plaintiff, Nancy Bockes ("Bockes"), was terminated without notice and a pre-termination hearing.

Following a post-termination hearing nearly a year later, a grievance panel found the termination to be improper. The grievance panel, however, did not order full backpay. Alleging that she was entitled to notice and a hearing before being discharged, Bockes brought this action against Grayson County, Virginia (the "County"), the Grayson County, Virginia Department of Social Services (the "Local Department"), and the members of the Grayson County, Virginia Board of Social Services, Bettye Lou Fields, Robert Wells, and Dennis Cooley, individually and in their official capacities (collectively "the Local Board"). The case was tried by a jury. At the conclusion of the evidence on liability, the court found that Bockes had a property interest, which entitled her to the protections of procedural due process under the Fourteenth Amendment. The court found, however, that the Local Board members had qualified immunity in their individual capacities.

The Local Department and the Local Board members in their official capacities argued that the Eleventh Amendment precluded an award of damages against them. They also argued that even if they had no Eleventh Amendment immunity, they could not be held liable because Bockes was not fired "pursuant to a policy, custom or usage," a prerequisite to liability under *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978). The County argued that it could not be held liable because the Local Department is a state agency, not a county agency, and that even if the Local Department were not a state agency, Bockes was not fired "pursuant to a policy, custom or usage" of the County. The court took the matter

under advisement and submitted the question of damages to the jury by way of special interrogatory.[1] The jury awarded compensatory damages of $20,000. For the reasons that follow, the court now finds that the Eleventh Amendment precludes a damage award against the Local Department and the Local Board but concludes that the County is liable for the jury verdict of $20,000.

I.

Bockes was employed as director of the Local Department from 1977 to 1990. The Local Personnel Administrative Manual ("Volume lA") for the Local Department classifies the position as "permanent." According to Volume lA, a "permanent position is a position of indefinite duration; there is no expiration date on such positions," and a permanent employee may be terminated only for cause. On June 8, 1990, the Local Board met with Bockes and told her that they had "lost confidence" in her. The Local Board then gave Bockes the option of resigning or being fired. Before responding, Bockes asked to make a phone call. After receiving advice from her lawyer, Bockes asked the Local Board to list the reasons for her dismissal in writing and to give her an opportunity to

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[1] The parties stipulated that the following damages were incurred by Bockes:

Health Premiums	$ 1,557.39
Travel	$ 441.00
Court Reporter	$ 1,392.00
Lost Wages	$ 9,770.89
Total	$13,161.28

respond. The Local Board declined on advice of counsel, and after Bockes refused to resign, the Local Board fired her. Bockes filed a grievance pursuant to Va. Code Ann. §§ 2.1-110-116. The grievance panel ordered the Local Board to reinstate Bockes and awarded her one-half of her backpay. Bockes then filed this suit to recover her remaining backpay as well as compensatory damages, alleging that the Local Board had violated her due process rights by not notifying her of the reasons for her termination and by not giving her an opportunity to respond to those reasons before her termination.

II.

As the court stated at trial, based upon the evidence presented, Bockes was a "permanent employee" with the Local Department, which gave Bockes a property interest in her job.[2] This property interest entitled Bockes to receive procedural due process. *See Cleveland Bd. of Educ.*

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[2] The wisdom of insulating a department head by classifying his or her position as a "permanent" position might be subject to debate. This, however, is not the forum for that debate. This court's role is limited to determining whether Bockes had a legitimate expectation of continued employment founded in state law, *Bishop v. Wood*, 426 U.S. 341 (1976), whether by statute, *Detweiler v. Virginia Dep't of Rehabilitative Services*, 705 F.2d 557, 590-60 (4th Cir. 1983), by contract, *Perry v. Sindermann*, 408 U.S. 593, 601 (1972), or by rules or mutually explicit understandings that support a claim of entitlement. At trial, the court determined as a matter of law that the department personnel manual created a mutually explicit understanding supporting a claim of entitlement. *See Bradley v. Colonial Mental Health & Retardation Services Bd.*, 856 F.2d 703, 707-08 (4th Cir. 1988).

v. Loudermill, 470 U.S. 532, 541 (1985). Procedural due process required that Bockes receive notice and "some kind of a hearing" before discharge. *See id.* at 542. Bockes received neither.

At trial the defendants argued that the actions of the Local Board were "random and unauthorized," and therefore, *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part by, Daniels v. Williams*, 474 U.S. 327 (1986), not *Loudermill*, governs. Under *Parratt*, post-deprivation remedies may be sufficient tc satisfy due process if the conduct complained of is random and unauthorized. *Id.* at 543-44. However, as the Court of Appeals for the Fifth Circuit stated, to apply *Parratt:*

> the deprivation must truly have been unpredictable or unforeseeable; the pre-deprivation procedures must have been impotent to counter the state actors' particular conduct; and the conduct must have been "unauthorized" in the sense that it was not within the officials' express or implied authority.

Caine v. Hardy, 943 F.2d 1406, 1413 (5th Cir. 1991) (citing *Zinermon v. Burch*, 494 U.S. 113, 132-35 (1990)). As noted by the court at trial, the absence of any one of those elements would preclude the court from applying *Parratt*. *See id.*

Plumer v. Maryland, 915 F.2d 927 (4th Cir. 1990), is instructive. Following an informal administrative hearing in which Plumer was shown an anonymous letter that accused Plumer of continual drunk driving, Tami Plumer's motor vehicle license was suspended by the Maryland Motor Vehicle Administration "pending clearance by the Medical Advisory Board." Rather than appeal

the suspension to the circuit court, Plumer filed a § 1983 action in the United States District Court for the District of Maryland claiming that her due process rights under the Fourteenth Amendment had been violated. The district court dismissed Plumer's due process claim, finding that the suspension of Plumer's license was a result of a "random and unauthorized act" for which Maryland provided an adequate post-deprivation remedy by way of appeal to the circuit court. Although the court of appeals affirmed because it found no due process violation, it concluded that *Parratt* could not be applied.

According to the Fourth Circuit, "[i]n response to some confusion in the courts of appeal regarding the scope of the *Parratt* doctrine, the Supreme Court recently reemphasized *Parratt's* narrow scope" in *Zinermon v. Burch*, 494 U.S. 113 (1990). *Plumer*, 915 F.2d at 929 (footnote omitted). The Fourth Circuit expressly agreed with the Fifth Circuit as to "[t]he lesson of *Zinermon*":

> "[T]he *Parratt/Hudson* doctrine is restricted to cases where it truly is impossible for the state to provide predeprivation procedural due process before a person unpredictably is deprived of his liberty or property through the unauthorized conduct of a state actor." *Caine v. Hardy*, 905 F.2d 858, 862 (5th Cir. 1990). We agree, and so conclude that *Parratt* is inapplicable to Plumer's suit against the state. Under *Zinermon*, as we concluded recently, we must "first ask whether the risk of an erroneous deprivation was foreseeable, and next whether predeprivation safeguards would have any value in guarding against the kind of deprivation . . . allegedly suffered." *Fields v. Durham*, 909 F.2d 94, 97 (4th

> Cir. 1990) (*Fields II*) (quoting *Zinermon*, 110 S.Ct. at 988).

Id. at 930. In the Fourth Circuit's opinion, "the risk of an erroneous license deprivation clearly was foreseeable" and procedural safeguards were practicable making *Parratt* inapplicable. *Id.* at 931. Moreover, according to the court:

> the conduct of the state employees here was not "unauthorized," for the state has delegated to its employees "the power and authority to effect the very deprivation complained of here, . . . and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful [termination]."

Id. (quoting *Zinermon*, 110 S. Ct. 975, 990 (1990)). Thus, Bockes' termination without a sufficient pre-termination hearing does not fall within, in the words of the Fourth Circuit, "*Parratt's* narrow scope." *Id.* at 929. As in *Plumer*, pre-deprivation process, rather than a post-deprivation remedy, was required under *Zinermon* because pre-deprivation process was possible and the state delegated to the Local Board the power to effect the very deprivation about which Bockes complained.

III.

The court next must consider whether the Eleventh Amendment precludes Bockes from recovering a judgment against the Local Department and the Local Board

because the Local Department is a state agency.[3] The Eleventh Amendment protects unconsenting states "against a private party's suit for damages." *Keller v. Prince George's County* (Keller II), 923 F.2d 30, 32 (4th Cir. 1991) (citations omitted). It is well settled that "any arm of the state is protected by such immunity." *Id.* (citations omitted). "On the other hand, a municipality or other local government unit does not enjoy the protection of the eleventh amendment and may be sued under § 1983 for constitutional deprivations." *Keller v. Prince George's County* (Keller I), 827 F.2d 952, 963 (4th Cir. 1987) (citations omitted). Because the bar of the Eleventh Amendment cannot extend to the County, the question before the court on this score is whether the Local Department is the alter ego of the state for Eleventh Amendment purposes.

Bockes suggests the following factors are considered in determining the status of the Local Department under the Eleventh Amendment: "the characterization of the Department under state law; the extent of state control over the Department; the extent to which it depends on state appropriations; and whether a damage award would come from state funds." *Keller I*, 827 F.2d at 964

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[3] It is well recognized that suits against individuals in their official capacity are actually suits against the governmental entity itself. *Revene v. Charles County Comm'rs*, 882 F.2d 870, 874 (4th Cir. 1989) (citations omitted); *Giancola v. West Virginia Dep't of Public Safety*, 830 F.2d 547, 550 (4th Cir. 1987). Therefore, Bockes' suit against the Local Board members in their official capacities is nothing more than a suit solely against the Department. The court will couch its Eleventh Amendment analysis in terms of the County and the Department, but the analysis will necessarily encompass the Local Board as well.

(citation omitted). These factors all probe an entity's relative degree of autonomy from the state. *Ram Ditta v. Maryland Nat'l Capital Park and Planning Comm'n*, 822 F.2d 456, 457-58 & n.4 (4th Cir. 1987). However, "the most important consideration is whether the state treasury will be responsible for paying any judgment." *Ram Ditta*, 822 F.2d at 457; *see also Keller I*, 827 F.2d at 964.

According to the evidence presented in this case, if the Local Department were found liable, most of the judgment would be paid by the state. Of the $20,000 jury verdict in favor of Bockes, the state would be responsible for approximately $13,000. This amount would be paid out of the state's Public Officials Liability Self-Insurance Plan, which is managed by the Treasurer of Virginia, who holds the money for the plan in a separate insurance fund. All political subdivisions in Virginia, including the Local Department, are allowed to participate in the insurance plan, although participation is voluntary. Since the Local Board decided that the Local Department would participate in this state self-insurance plan, the Local Department pays a premium into the insurance fund "using a combination of state and local funds," with the state reimbursing the Local Department for 80% of the premium.

Bockes argues that since the damage award would be paid from a separate fund, there is no effect on the state treasury so as to afford the Local Department the protection of the Eleventh Amendment. That argument is misplaced on the record before the court. According to the evidence, the Local Department is reimbursed by the state for 80% of its premium payments. Due to the disparate amount of money provided by the state for the

premium payments, any judgment from the insurance fund will inexorably affect the state treasury as a majority of state money was paid into the insurance fund and would, therefore, be used to cover a judgment award against the Local Department. The fact that the insurance fund is separate from the general treasury is of no consequence. *See, e.g., Paschal v. Jackson*, 936 F.2d 940, 944-45 (7th Cir. 1991) (segregating state money into separate fund does not change fact that recovery is out of state treasury), *cert. denied*, 112 S. Ct. 992 (1992). The crucial inquiry is whether state funds will be used to pay for a damage award, which is clearly the case here. Accordingly, the court finds that a recovery of the $13,000 would be, in effect, a recovery of funds from the state prohibited by the Eleventh Amendment.[4]

The structure and organization of the Local Department and its relationship with the Virginia Department of Social Services ("the Virginia Department") also favors the finding that the Local Department should be treated as the states' alter ego for Eleventh Amendment purposes. First, although in Virginia, the Grayson County Board of Supervisors ("the County Board") appoints and

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[4] The court recognizes that the court of appeals has held that a damage award that would be satisfied from a separate unemployment compensation fund did not violate the Eleventh Amendment. *Brown v. Porcher*, 660 F.2d 1001, 1006-07 (4th Cir. 1981), *cert. denied*, 459 U.S. 1150 (1983). However, *Brown* involved no state money and, therefore, is not controlling. *See id.; see also Dyson v. Lavery*, 417 F. Supp. 103, 107-09 (E.D. Va. 1976) (college had judgment against it that could be satisfied out of student activities fee fund, which contained no state money, and therefore, college could not invoke Eleventh Amendment to prohibit retroactive damage award).

is authorized to remove the members of the Local Board, who, in turn, select the local director and employees, the Virginia Commissioner of Social Services ("the Commissioner") is expressly authorized to remove them. Va. Code Ann. § 63.1-45, -62. Second, the County must follow state procedures and guidelines in organizing its Local Department. *See, e.g.*, Va. Code Ann. § 63.1-26. Third, the Local Board is required to submit its budget to the Commissioner. Va. Code Ann. § 63.1-54. Fourth, local boards of social services have not attained the local, independent status traditionally afforded other local boards. *Compare* Va. Code Ann. § 22.1-71 (code section entitled "School board constitutes body corporate; corporate powers"); *Ram Ditta*, 822 F.2d at 458. Finally, the County contributes no more than 20% of the funding for the Local Department, with the remainder coming from varying combinations of state and federal funds.

In sum, the Local Department's structure and organization and its relationship with the Virginia Department, coupled with the fact that most of the judgment would be paid from state funds, preponderate in favor of the conclusion that the Local Department is, in essence, the states' alter ego, and thus, protected by the Eleventh Amendment from a damage award in a § 1983 action in federal court.[5] *Compare Ram Ditta*, 822 F.2d at 458-59 (Parks & Planning Commission was designated as body corporate, was not required to submit budget to state, was not represented by state attorney general's office,

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[5] Neither party raised nor does the court find any waiver of Eleventh Amendment immunity with regard to the Department or the Board.

and state exercised no control over Commission personnel matters, and, therefore, court found it to be local agency). That conclusion, however, does not end the court's inquiry because the County, nevertheless, may be subject to liability if the Local Board's actions may be fairly attributed to the County.[6]

IV.

A county is subject to municipal liability "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Spell v. McDaniel*, 824 F.2d 1380, 1385 (4th Cir. 1987) (quoting *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978)), *cert. denied*, 484 U.S. 1027 (1988). " '[P]olicymaking authority' implies authority to set and

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[6] The reasoning of *Keller II*, which held that a local department of social services in Maryland was, in effect, an agency of the state and, therefore, immune from suit, provides some support. In *Keller II*, the court of appeals stated:

> [t]he Department is a local department of social services operated by the Maryland Department of Human Resources, an agency of the executive branch of state government. The employees of the Department receive fringe benefits and paychecks from the state and perform their duties subject to state personnel policy. State law and procedure dictate how the Department operates and organizes its programs. Only two percent of the Department's funding comes from the county with the remainder coming from the state and federal governments.

923 F.2d at 32.

implement general goals and programs of municipal government, as opposed to discretionary authority in purely operational aspects of government." *Spell*, 824 F.2d at 1386; *see, e.g., Bennett v. City of Slidell*, 728 F.2d 762, 769 (5th Cir. 1984) ("policymakers act in the place of the governing body in the area of their responsibility"), *cert. denied*, 472 U.S. 1016 (1985). Final authority is "a necessary attribute of 'policymaking authority.' " *Spell*, 824 F.2d at 1386. However, "a municipal agency or official may have final authority to make and implement policy despite a municipality's retention of powers of ultimate control over both policy and policymaker. The question is one of authority-in-fact." *Id.* A single decision by an official exercising such authority is sufficient to subject a municipality to § 1983 liability. *Morrash v. Strobel*, 842 F.2d 64, 67 (4th Cir. 1987) (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80 (1986)).

Though the definition of policymaker is a matter of federal law, the determination of which official or officials fall within this definition is necessarily guided by state law. *Dotson v. Chester*, 937 F.2d 920, 924 (4th Cir. 1991) (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988)). Examining state law, which can include valid local ordinances and regulations, will usually "direct a court to some official or body that has the responsibility for making law or setting policy in any given area of a local government's business." *Id.* From an examination of the control in fact exercised by the County Board through its appointment of Local Board members, the court readily concludes that the Local Board's actions, at least as to personnel matters, are fairly attributable to the County Board and, therefore, the County.

The County maintains that a finding by the court that the Local Department is a state agency for Eleventh Amendment purposes would preclude the County from being held liable because it did not employ the tortfeasors – the board members of the Local Department that discharged Bockes without affording her due process. That argument, however, begs the question. In determining whether the County is liable, the question is not by whom are the tortfeasors employed. Rather, the question is whether the tortfeasors were carrying out official County policy – that is, whether their conduct is fairly attributable to the County. *See Witt v. Harbour*, 508 F. Supp. 378, 380 n.5 (W.D. Va. 1980), *aff'd*, 644 F.2d 883 (4th Cir.), *cert. denied*, 454 U.S. 879 (1981). The court has concluded that because the Local Board exercised authority that it was expressly authorized by law to exercise and because ultimate local control over the Local Board is given to the County Board, the decision to discharge Bockes is fairly attributable to the County.

The structure of the chain of command of the Local Department is somewhat unique. As previously mentioned, the Local Board, which is expressly authorized to hire and fire the local director, is appointed and can be removed by the County Board. At the same time, the Virginia Department retains oversight responsibilities and is authorized to discharge Local Board members as well as Local Department employees who fail to meet state standards. Thus, authority over day-to-day personnel matters is exercised at the local level with ultimate local control resting with the County Board, which is expressly authorized to discharge members of the Local Board at will. *Cf. Dotson*, 937 F.2d at 928-32 (concluding

that sheriff who was designated as state official was acting as county official, and thus, subjected county to § 1983 liability); *Hughes v. Halifax County Sch. Bd.*, 855 F.2d 183, 185 (4th Cir. 1988) (school board, not maintenance supervisor lacking authority to control and supervise personnel, is policymaker for school personnel decisions), *cert. denied*, 488 U.S. 1042 (1989); *Morrash v. Strobel*, 842 F.2d 64, 67-68 (4th Cir. 1987) (city council, not director of public safety, is policymaker, because council retains right to decide how to utilize personnel). Given such a structure, it is not inconsistent to find that the discharge of the local director by the Local Board is an act fairly attributable to the County.[7] On the one hand, the County cannot, in effect, maintain control over the personnel decisions of the Local Department and, on the other hand, escape accountability simply because the Local Department technically can be classified as an agency of the state for Eleventh Amendment purposes. *See Dotson*, 937 F.2d at 928 ("the Sheriff is not always a state employee or always a county employee. He may, on occasion, be both, or sometimes one and sometimes the other. *It all depends on the particular function the Sheriff is performing.*") (emphasis added).

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[7] Additional authority indicates clearly that the Local Board is the policymaker for personnel matters. According to the terms of Volume lA, a publication of the Virginia Department, the Local Board is the "appointing authority" for all personnel actions. Volume lA, Chapter A at 11. Moreover, the Handbook for Local Boards of Social Services notes that the Local Board is a policymaking body. Handbook at 17.

V.

For the above-stated reasons, the court finds that Bockes was entitled to but did not receive procedural due process before she was discharged, that the Eleventh Amendment precludes a judgment award against the Local Department and the Local Board, and that the County is liable for the Local Board's decision to discharge Bockes without affording her procedural due process. In accordance with the jury's verdict, therefore, the court will enter judgment against the County in the amount of $20,000.

ENTER this 29th day of July, 1992.

/s/ Illegible
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
August 23, 1993

No. 92-2047

CA-91-62-A

NANCY BOCKES

Plaintiff -Appellant

v.

BETTYE LOU FIELDS, Individually and as a member and Chairman of the Board of Social Services, Grayson County, Virginia; ROBERT WELLS, Individually and as a member of the Board of Social Services, Grayson County Virginia; DENNIS COOLEY, Individually and as a member and Vice-Chairman of the Board of Social Services, Grayson County, Virginia; DEPARTMENT OF SOCIAL SERVICES, Grayson County, Virginia

Defendants - Appellees

and

COUNTY OF GRAYSON, VIRGINIA

Defendant

No. 92-2072

CA-91-62-A

NANCY BOCKES

Plaintiff - Appellee

v.

COUNTY OF GRAYSON, VIRGINIA

Defendant - Appellant

and

BETTYE LOU FIELDS, Individually and as a member and Chairman of the Boa:d of Social Services, Grayson County, Virginia; ROBERT WELLS, Individually and as a member of the Board of Social Services, Grayson County Virginia; DENNIS COOLEY, Individually and as a member and Vice-Chairman of the Board of Social Services, Grayson County, Virginia; DEPARTMENT OF SOCIAL SERVICES, Grayson County, Virginia

Defendants

On Petition for Rehearing with
Suggestion for Rehearing in Banc

Appellant Bockes' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

NANCY BOCKES,	)	
Plaintiff	)	CIVIL ACTION NO.
v.	)	91-0062-A
BETTYE LOU FIELDS, et al,	)	
Defendants	)	

AFFIDAVIT

I, Nancy Bockes, hereby swear and affirm that the following statements are true:

1. I am employed as the director of the Grayson County Department of Social Services. The employees of our agency and myself always have been considered to be local employees of a local agency, and not state employees or employees of a state agency.

2. Our Department of Social Services employees are covered by Grayson County's Blue Cross/Blue Shield group health insurance policy. This is the same policy that all county employees, with the possible exception of the sheriff's department, participate in. I am unaware of any provisions in either the state code or state board policy which would allow employees of a local social services agency to participate in the state employee group health insurance policy. Eighty percent of the cost of the premiums for the health insurance policy are borne by the state, and twenty percent are paid by Grayson County. Grayson County pays the premiums for our

employees, and then receives eighty percent reimbursement from the state of Virginia.

3. The Grayson Department of Social Services rents office space from Grayson County, and our office is located in the basement of the Grayson County Courthouse. The rent is 80/20 money. (eighty percent paid by the state; twenty percent by the county).

4. Room and board expenses for our foster care program is 50/50 money (fifty percent paid by the state; fifty percent by the county). Foster care services is paid with 80/20 money; however, when that money is exhausted, the ratio then becomes 50/50. We almost always run out of our state allotment, and are forced to use 50/50 money.

5. The general relief program is solely a local option program. That is, our board of social services in Grayson County has determined that we will offer the general relief program. This program is totally discretionary on the part of the local board and is not mandated by the state of Virginia. The ratio for this program is approximately 62/38 (sixty-two percent paid by the state; thirty-eight percent by the county). It is my understanding that most counties have dropped their general relief program since it is a local option program.

6. Our social services board members are paid a $30.00 salary per month for attending our board meetings. This money is local only money, meaning there is no state reimbursement ("local" money means funds allocated to us by the Grayson County Board of Supervisors). The board members' mileage expenses are reimbursed 80/20.

7. Our commodity program (the distribution of food products to the needy) is funded with local only money, and then we are reimbursed by the federal government. No state money is used for this program.

8. Our local board of social services is the hiring authority for our department. In interviewing prospective employees for our department, our board always informs those applicants that if hired they would be considered the same as any other county employee.

9. The Grayson County Social Services Board voted to allow our employees to participate in the state grievance procedure, as opposed to participating in a local grievance procedure.

10. The Grayson County Board of Supervisors, in the past, decided that all county employees, including the Department of Social Services employees, would be covered by the state employee retirement fund, and not a local plan.

11. The employees of the Grayson County Department of Social Services do not receive raises unless the Grayson County Board of Social Services approve such raises. The Grayson County Department of Social Services employee do not receive the same raises that state employees throughout Virginia receive. Our raises are totally dependent upon the action of our local board of social services.

12. Our department has five cars which are titled in our local agency's name and which have local license plates. Our cars are serviced at the Grayson County

garage, and we purchase gasoline from the county. Conversely, state vehicles have state license plates, are serviced at the Virginia Department of Transportation garage, and purchase their gasoline from the Department of Transportation.

13. On several occasions the Grayson County Administrator, Don Young, and other county officials have borrowed our automobiles, particularly our van, for county use.

14. The Chairman of the Grayson County Board of Social Services signs all warrant registers which are then sent to the county treasurer for the issuance of payroll checks. There is no state involvement in this procedure.

15. The County Treasurer signs and issues the payroll checks for our social services employees. The eighty percent state reimbursement for these costs is paid directly to the County Treasurer.

16. The County Treasurer handles all of our department's accounts and keeps track of all of our books. Our agency keeps no money; the County Treasurer handles everything. The Department of Social Services can write checks, but the County Treasurer must sign them.

17. The cost for my grievance procedure, which would have included attorney fees, court reporter fees, and the administrative hearing chairman's fees, was paid with 100 percent local money. No state funds were approved or appropriated for this expense.

18. The Board of Supervisors for Grayson County must approve all new programs or new employees which would require the expenditure of twenty percent local

money. Without that approval from the County, we could not implement new programs or hire additional employees. Thus, the Board of Supervisors directly controls whether we implement new programs or hire additional employees.

19. Every Grayson County employee, including employees of the Department of Social Services, pay five percent of their salary into the Virginia Retirement System. Conversely, the state of Virginia pays this five percent share for state employees. Those state employees pay nothing out of their own paychecks.

20. When the regular County audit is performed, the Grayson Department of Social Services is audited at the same time and by the same auditors who audit every other county department. My work performance as director of this agency is evaluated on a regular basis by the Grayson Board of Social Services. No one from the State Department of Social Services or the Western Region Department of Social Services participates in my evaluations.

21. I recently had to request an additional allocation from the Grayson County Board of Supervisors in the approximate amount of $12,500.00, which was the local share (50%) to fund necessary programs in foster care, ADC foster care and subsidized adoption, through the end of the fiscal year. If the county doesn't give us those funds, we cannot obtain the 80% state money (approximately $69,000.00).

22. If there is no insurance coverage, it is my understanding that any civil judgments awarded against the Board of Social Services or the Grayson Department of

Social Services would have to be paid out of local only money, and is not reimbursed by the state.

/s/ Nancy Bockes
Nancy Bockes

STATE OF VIRGINIA
COUNTY OF WILLIAMSBURG

Personally appeared before me, a Notary Public for State and County aforesaid, Nancy Bockes, who, upon being duly sworn, stated that the foregoing is true and correct to the best of her knowledge and belief.

WITNESS my signature and seal this 12th day of March, 1992.

/s/ Barbara J. Thompson
Notary Public whose
commission expires on
December 31, 1994

[SEAL]

LOGO

COMMONWEALTH OF VIRGINIA

DEPARTMENT OF SOCIAL SERVICES

November 14, 1986

TO: Local Directors/Superintendents

SUBJECT: PUBLIC OFFICIALS LIABILITY SELF INSURANCE PLAN

You were recently mailed information from the State's Division of Risk Management concerning the above. If your agency is not presently covered by Professional Liability Insurance, you are encouraged to make immediate application to the Office of Risk Management for such coverage as is now being offered.

The Department of Social Services will reimburse 80% of the premium cost for this insurance. This Department will not participate in reimbursement of any deductible amounts that may be charged under policy terms of the insurance.

If your agency is currently covered by your local city or county Public Officials and Employees' Legal Liability Insurance policy, you will note from the Division of Risk Management's release that local welfare/social services agencies will *not* be insured in any policy Risk Management may issue in the future to your local governing body. This prohibition also seems to be applicable to most private insurance carriers.

Now that the Division of Risk Management has developed and published its plan to offer Public Officials Liability Self Insurance to all local welfare/social services agencies that make application, we see no reason for any

local agency not to have adequate financial protection and legal services in the event a professional liability claim is made against any welfare/social services agency or its employees.

If you need assistance of any kind in matters relating to professional liability insurance, please contact Mr. S. P. Hair, Director, Division of Administration, telephone (804) 281-9206.

/s/ William L. Lukhard
William L. Lukhard

cc: Regional Directors

LOGO

COMMONWEALTH of VIRGINIA

DEPARTMENT OF GENERAL SERVICES

June 4, 1992

DIVISION OF RISK MANAGEMENT
JAMES MADISON BUILDING
4TH FLOOR
109 GOVERNOR STREET
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TO WHOM IT MAY CONCERN

PUBLIC OFFICIALS LIABILITY SELF-INSURANCE PLAN (POLSIP)

I am employed by the Commonwealth of Virginia, Department of General Services, Division of Risk Management (DRM).

Under Section 2.1-526.8:1, of the code Virginia, DRM acts as the administrator and trustee for the POLSIP.

The POLSIP is essentially a group self-insurance that is non-assessable. All political subdivisions in Virginia are eligible to participate in the Plan. Such participation is voluntary.

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Any check making payment out of the Trust Fund account is signed by the Treasurer of Virginia. The account is held in the name of the Commonwealth.

I can be reached at (800) 678-4924, extension 5-4616, if further information is needed.

Sincerely,

/s/ Robert C. Vogt
Robert C. Vogt
Program Manager
Political Subdivisions

LOGO
COMMONWEALTH of VIRGINIA
DEPARTMENT OF GENERAL SERVICES

July 8, 1993

DIVISION OF RISK MANAGEMENT
JAMES MADISON BUILDING
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Daniel R. Bieger, Esq.
Copeland, Molinary & Bieger, P.C.
212 West Valley St.
P.O. Box 1296
Richmond, VA 24210

Re: Clyde and Janice Quick

Dear Mr. Bieger:

This letter will acknowledge receipt of your fax sent to the Office of the Attorney General. Please be advised that this office now handles claims made against agencies of the Commonwealth.

We are of the opinion that the Buchanan County Department of Social Services is not a State agency for the purposes of the Tort Claims Act. We will, however, retain your letter for whatever legal effect it may have.

Sincerely,

/s/ Lynne Noyes
Lynne E. Noyes
Claims Management
Specialist

cc. Kurt J. Pomrenke, Esq.
Bill Jones

* * *

The Board as a Policy-Making Body

The local Board of Social Services should also be involved in assisting in the development of agency policy. Policy-making boards have a primary responsibility for keeping the agency's goals and objectives relevant and geared to meet the community's needs as they are articulated through the various publics the agency serves. The Social Services Board assures, through policy and procedures, that the agency programs are translated into both efficient and effective services. When functioning in a policy-making role, the Board follows a process which includes 1) problem identification and priority setting, 2) problem analysis through collection of facts and examining alternative solutions, 3) planning and developing procedures to implement the alternative selected, and 4) finalizing its decisions in clearly stated policy. This process results in uniform standards and methods which assure equitable distribution of financial and social service resources, fair treatment of clientele, and protection of the public interest from inappropriate expenditures by staff in the execution of their duties. No policy can conflict with State Board policy. [p. 17]

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA
Abingdon Division

NANCY BOCKES, Plaintiff, vs BETTYE L. FIELDS, individually and as a Member and Chairman of the Board of Social Services, Grayson County, Virginia, et al., Defendants.	Civil Action No. 91-62-A (Filed Jan. 8, 1993) 9:45 a.m. February 5, 1992 Abingdon, Virginia

PARTIAL TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE SAMUEL G. WILSON
UNITED STATES DISTRICT JUDGE, and a jury

APPEARANCES:

KURT J. POMRENKE, Esquire
White, Elliott & Bundy
P.O. Box 8400
Bristol, Virginia 24203-8400
Counsel for the Plaintiff.

ROBERT V. WARD, Esquire
P.O. Box 1809
Bristol, Virginia 24203-1809
Counsel for the Defendants.

Proceedings recorded by mechanical stenography, transcript produced by Reporter.

BRIDGET A. DICKERT
UNITED STATES COURT REPORTER
P.O. BOX 749
ABINGDON, VIRGINIA 24210
(703) 628-2549

[Carol Brunty on Direct Examination by Kurt Pomrenke]

[p. 3] Q In your capacity as Regional Director do you engage in any type of supervisory role over Nancy?

A The Virginia Social Services system is state supervised, locally administered, so I am not directly her boss. The local board would be. but we provide supervision, we do reviews and compliance to make sure the programs are properly run.

Q And how large is your region?

A Currently it's 22 agencies. I serve the first four planning districts and Patrick County. That was changed last July. It was the first three planning districts and probably will expand again this coming July as the budget impacts are felt.

Q So, geographically how far up the interstate do you go?

A I go all the way to Montgomery, Floyd and Patrick Counties, and then I serve all the way to Lee County.

Q And how many regional directors are there in the State of Virginia?

A Currently there are five regions, but only three directors, and it appears there will remain three regional directors due to budget constraints.

* * *

[Robert Wells on Direct Examination by Robert Ward]

* * *

[p. 78] Q . . . Did you reach a point in time where you reached a decision you didn't think was in the best interest of the board for this lady to be a director?

A That's exactly right.

Q Did you have a conversation with these other two members about that?

A Yes, I did.

Q Did you come upon an agreed course of action?

A Yes, sir.

Q As a result of that agreed course of action did you, did you consult an attorney in Marion?

A Yes, I did?

A [sic] About when was that?

A Sometime in May, I think.

[p. 79] Q 1990?

A 1990.

Q All right. On the first occasion with the attorney did all three members go?

A No, sir, just myself.

Q Did you discuss with the attorney the problems?

A Yes, sir.

Q How many times were you present at meetings with your lawyer?

A By myself or with the board?

Q Both. How many times by yourself –

A I think I met with Joe Tate twice, the first time to discuss with him, you know, about the information that I had, or if we were correct in what we were trying to do, to advise us, and then one other time I think I stopped by there and dropped off some more statements people had given me, and then one time we three met together.

Q All right. Did you tell Mr. Tate that you wanted to fire Mrs. Bockes?

A No, I don't think I said it that way. I said, "What can we do?" I said, "Can we fire her? We need advice."

Q Were you told that you had to comply with the provisions of 1-A, manual 1-A?

[p. 80] A No, sir.

Q Did you, as a board, decide to terminate Mrs. Bockes from her employment?

A Yes, sir.

Q Did you follow Mr. Tate's advice in doing that?

A Yes, sir.

Q And what advice was that? What specifically did Mr. Tate tell you you had to do?

A To dismiss her, to tell her that we had lost faith in her ability to run that agency.

Q Did he give you any instructions as to whether you should say anything else?

A He told us to keep our mouths shut.

Q Did you follow his instructions?

A Yes, sir.

Q Did you discuss with him the provisions of the code section that said the superintendent serves at the pleasure of the board? Did you discuss that with him?

A Yes, sir. I asked him specifically about that.

Q Did you know what it meant when it said subject to the provisions of the merit system?

A No, sir, I did not.

Q Did you rely on his advice to comply with what that meant?

[p. 81] A Yes, sir.

Q The procedure that happened on June 8, 1990, was that done in accordance with your attorney's instructions?

A Yes, it was.

* * *

[Dennis Cooley on Direct Examination by Robert Ward]

* * *

[p. 88] Q Did you reach a point when you felt it was in the best interests of the Grayson County Department of Social Services to terminate Mrs. Bockes from her position?

A Yes, sir.

Q When was that?

A I guess probably May, something to that effect.

Q Do you have any written notes to recall specific dates?

A No.

Q Did you, did you have conversations with Mrs. Fields and Mr. Wells about this?

A Yes, sir.

Q Was there any agreement to contact an attorney?

A Yes, sir.

Q Before any board action was taken on June 8th of 1990 did you, yourself, also meet with an attorney?

A Yes, sir.

Q Who was present?

A The other board members.

Q Okay. Was, at that point in time was a decision made that you could fire Mrs. Bockes by the procedure used, June 8th?

[p. 89] A Yes, sir.

Q What were your instructions?

A To terminate.

Q What were your instructions as to how?

A That's what we had to do, simply termination, since she was an at will employee.

Q Who used the term at will employee?

A Pleasure of the board.

Q What I'm asking you, were those the attorney's words or were they your words?

A Oh, I'm sorry. Yes, sir. The attorney's words.

Q All right. If you had been told that you had to comply with the provisions of 1-A by your attorney would you have done that?

A Yes, sir.

Q At the time that the action was taken on June 8, 1990 did you believe you were in full compliance with the law?

A Yes, sir.

* * *

[Bettye Lou Fields on Direct Examination by Robert Ward]

* * *

[p. 94] Q Did you reach a point where you felt it was in the best interests of the Department of Social Services of Grayson County to terminate Mrs. Bockes and replace her with someone else?

A Yes, I did.

Q Was that an easy thing to do?

A No, it was not.

Q When you went on the board did you take an oath?

A Yes, sir.

Q Did you discuss this with Mr. Wells and Mrs. Cooley?

A Yes, I did.

Q Did there come to be an agreement that something had to be done?

A Yes.

Q As a result of that were you present for the meeting with the attorney?

A Yes, one meeting with the attorney, the three of us.

Q Pardon?

A The three of us met with the attorney.

[p. 95] Q Okay. At that meeting were you told you had to comply with the provisions of 1-A?

A No, sir.

Q At that meeting were you told, at least given 1-A, the appropriate procedure for terminating Mrs. Bockes?

A Yes, we were told that to just tell her that we had lost confidence in her ability to lead, to say nothing else, to give no other reasons, that she was, that she would, she worked at the pleasure of the Board, and that meant we didn't even have to have a reason. We certainly wouldn't – well, anyway, that's what we did.

Q Did you follow his advice?

A Yes.

Q When you were asked to name specifics did you follow his advice and not say anything?

A Yes, sir.

Q If you had been told to comply with provisions of 1-A by the attorney would you have done that?

A Yes, sir.

* * *

Supreme Court, U.S.
FILED
DEC 27 1993
OFFICE OF THE CLERK

(2)

No. 93-818

In The

Supreme Court of the United States

October Term, 1993

NANCY BOCKES,

Petitioner,

v.

BETTYE LOU FIELDS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) WHETHER A LOCAL BOARD OF SOCIAL SERVICES IS AN AGENT OF THE STATE FOR ELEVENTH AMENDMENT PURPOSES WHEN A JUDGMENT AGAINST THE LOCAL BOARD WOULD NECESSARILY EFFECT THE STATE TREASURY?

(2) WHETHER A COUNTY MAY BE HELD LIABLE FOR THE ACTIONS OF A LOCAL BOARD OF SOCIAL SERVICES WHEN THE ACTIONS SURROUND THE IMPLEMENTATION OF STATE POLICY RATHER THAN COUNTY POLICY?

LIST OF PARTIES

MS. NANCY BOCKES, Petitioner

MS. BETTYE LOU FIELDS, in her official capacity as member and Chairman of the Grayson County Board of Social Services,

MR. ROBERT WELLS, in his official capacity as member of the Grayson County Board of Social Services,

MR. DENNIS COOLEY, in his official capacity as member of the Grayson County Board of Social Services,

GRAYSON COUNTY DEPARTMENT OF SOCIAL SERVICES,

and

GRAYSON COUNTY, VIRGINIA,

Respondents.

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CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

1. U.S. Constitution Amendment XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.

2. Va. Code § 1-13.17.

Ordinances, etc., not to be inconsistent with Constitution and laws.

When the council or authorities of any city or town, or any corporation, board, or number of persons, are authorized to make ordinances, bylaws, rules, regulations or orders, it shall be understood that the same must not be inconsistent with the Constitution and laws of the United States or of this Commonwealth.

3. Va. Code § 2.1-526.8:1.

Insurance plans administered by the Department of General Services, Division of Risk Management, for political subdivisions and constitutional officers.

See: Petition of Ms. Bockes, 2-3.

4. Va. Code § 63.1-25.

Making rules and regulations.

The State Board shall make such rules and regulations, not in conflict with this title, as may be necessary or desirable to carry out the true purpose and intent of this title.

The Board also may make such rules and regulations as may be necessary in authorizing local boards of public welfare to destroy or otherwise dispose of such records as the local boards in their discretion deem are no longer necessary in such offices and which serve no further administrative historical or financial purpose.

5. Va. Code § 63.1-33.

Requiring reports from local boards; forms and submission schedule; approval of budgets by Commissioner.

A. The Commissioner shall require of local boards such reports relating to the administration of this title as the Commissioner may deem necessary to enable the State Board and the Commissioner to exercise and perform the functions, duties and powers conferred and imposed by this title. He shall prescribe the form and submission schedule of applications, reports, affidavits, budgets and budget exhibits, and such other forms as may be required in the administration of this title.

B. The Commissioner shall review budget requests submitted by local boards of public welfare, make modifications consistent with the requirements of this title and transmit the approved budget to each local board.

6. Va. Code § 63.1-34.

Access to records of local boards.

The Commissioner or his designated agents shall have access at all times to the records of the local boards relating to the appropriation, expenditure and distribution of funds for, and other matters concerning, assistance and services under this title.

7. Va. Code § 63.1-37.

Standards for personnel.

The Commissioner shall enforce the entrance and performance standards established by the State Board for personnel employed in the administration of this title and remove each employee who does not meet such standards.

8. Va. Code § 63.1-50.

Administration of law.

The local boards shall, subject to the rules and regulations of the State Board, administer the provisions of Chapters 3 (§ 63.1-38 et seq.), 4 (§ 63.1-59 et seq.) and 6 (§ 63.1-86 et seq.) of this title in their respective counties and cities.

9. Va. Code § 63.1-91.

Local appropriation.

See: Petition, 5.

10. Va. Code § 63.1-92.

Reimbursement of localities by the Commonwealth.

Such funds as are received from the United States and agencies thereof as grants-in-aid for the purpose of providing assistance grants shall be paid monthly by the Commissioner to each county, city or district fiscal officer as reimbursement of the federal share of such grants as have been paid by each county and city under the provisions of this law. Within the limits of the appropriations of state funds, the Commissioner shall also reimburse

monthly each county, city or district fiscal officer to the extent of sixty-two and one-half percent of the balance of such assistance grants as have been paid by each county, city or district fiscal officer after crediting them with the reimbursement made from federal funds; however, on and after January 1, 1972, within the limits of the appropriations of state funds, the Commissioner shall make such reimbursements for the entire balance of such grants as have been paid by each city, county or district fiscal officer after such credits. Within limitations of state funds, the Commissioner shall reimburse monthly each city, county or district fiscal officer to the extent of sixty-two and one-half percent of such expenditures made in connection with assistance provided under §§ 63.1-25.1 and 63.1-106. Within the limitations of the appropriations of state funds for the purpose, the Commissioner shall reimburse at the end of the fiscal year each city, county or district fiscal officer to the extent of eighty percent of expenditures made for auxiliary grants pursuant to § 63.1-25.1. Within limitation of state funds appropriated for the purpose, the Commissioner shall reimburse to each county, city or district fiscal officer an amount not less than fifty percent or more than sixty-two and one-half percent of such expenditures, not federally reimbursable, made for the care of children placed in family homes or institutions pursuant to § 63.1-56.

Administrative expenditures made by the localities in connection with the providing of assistance grants, other benefits and related services, including child welfare, shall be ascertained by the State Board, and the Commissioner shall, within the limits of available federal funds and state appropriations, reimburse monthly each county,

city or district fiscal officer therefor out of such federal and state funds in an amount to be determined by the State Board not less than fifty percent of such administrative costs.

The Commissioner also shall reimburse monthly, to the extent of funds available for such purpose, each county, city or district fiscal officer out of state and federal funds, to the extent provided in the preceding paragraph, for monthly rental payments for office space provided the department of public welfare or social services in publicly owned buildings, for payments which are based on the cost of initial construction or purchase of a building or a reasonable amount for depreciation of such building, and/or the cost of repairs and alterations to either a privately or publicly owned building. However, no monthly rental payment shall exceed a reasonable amount as determined by the Commissioner.

In the event the issuance of checks by the Commonwealth is adopted as provided in § 63.1-92.1, local boards issuing emergency payments as authorized by law shall be reimbursed by the Commonwealth for such payments as provided in this section.

Claims for reimbursement shall be presented by the local board to the Commissioner, and shall be itemized and verified in such manner as the Commissioner may require. Such claim shall, upon the approval of the Commissioner, be paid out of funds appropriated by the Commonwealth and funds received from the federal government for the purposes of this law, to the treasurer or other fiscal officer of the county or city. Wherever two or more counties or cities have been combined to form a

welfare district pursuant to § 63.1-44, reimbursements by the Commissioner under this section shall be paid to the district fiscal officer or other person designated to receive such funds by the governing bodies of such counties or cities. Effective July 1, 1972, however, the Commonwealth shall reimburse each county and city the full amount of assistance grants provided for aid to dependent children.

11. Va. Code § 63.1-116.

Right of appeal to State Board.

Any applicant or recipient aggrieved by any decision of a local board in granting, denying, changing or discontinuing assistance, may, within thirty days after receiving notice in writing of such decision appeal therefrom to, or ask for a review of the same by the State Board.

Any applicant or recipient aggrieved by the failure of the local board to make a decision within a reasonable time may ask for a review of the same by the State Board.

The Board may, from time to time as it deems appropriate, appoint a committee consisting of any three of its members to consider and make final determinations on any such appeal or review.

The Board may delegate the duty and authority to duly qualified hearing officers to consider and make determinations on any appeal or review by an applicant for or recipient of public assistance concerning any decision of a local board. The determination by the hearing officer may be reviewed by the Board upon the request of either the applicant, recipient or the local board. A review of the hearing officer's determination by the Board shall

be governed by such rules and procedure as the Board shall determine.

12. Va. Code § 63.1-118.

Review by State Board on own motion; application not acted on by local board.

The State Board may, upon its own motion, review any decision of a local board, and may consider any application for assistance upon which a decision is not made by the local board within a reasonable time.

STATEMENT OF THE CASE

Shortly after Bettye Lou Fields, Robert Wells and Dennis Cooley were appointed to the Board of Social Services of Grayson County, Virginia, ("the board"), the board came to the conclusion that it was no longer in the best interest of the Grayson County Department of Social Services, ("the department"), that Nancy Bockes, ("Ms. Bockes"), continue as the director of the Department. A53-58. The board consulted an attorney for advice as to how to terminate the employment of Ms. Bockes. The advice given to the board was that Ms. Bockes served at the pleasure of the board and that her employment could be terminated by the board. A53-58. In accordance with their attorney's advice, the board terminated Ms. Bockes employment on June 8, 1990. A56-57.

Ms. Bockes instituted a grievance claiming that her termination did not comply with Volume 1A of the Local Personnel Administrative Manual prepared by the Virginia Department of Social Services. A30. A grievance

panel was convened under the state grievance procedure and the panel reinstated Ms. Bockes with half of her back pay and the appropriate benefits that would have been earned for that amount of pay. A35-36.

Ms. Bockes instituted this action against the County of Grayson, the members of the board in their individual and official capacities, and the Grayson County Department of Social Services to recover the back pay not awarded by the grievance panel and attorney fees. After hearing the evidence, the District Court held as a matter of law that Ms. Bockes was a "permanent employee" under the state personnel plan and that because a pre-termination hearing was not held, Ms. Bockes was denied due process. A15-16. The District Court allowed the case to go to the jury on the issue of damages alone and the jury returned a verdict of $20,000.00 for Ms. Bockes, approximately $13,000.00 of which had been stipulated by the parties. A14. The District Court entered judgment for Ms. Bockes against the County of Grayson. The District Court entered judgment in favor of the department and the board. A27.

Accompanying the final order of the District Court was an opinion which set forth the grounds for the decision. *Bockes v. Fields*, 798 F.Supp. 1219 (W.D. Va. 1992). The opinion held that due primarily to the appointment of the local board by the county, the county must be liable for any damages suffered by Ms. Bockes. A25-26. This finding was a partial basis for Grayson County, Virginia's appeal to the Fourth Circuit.

The District Court further determined that the board and the department were agencies of the Commonwealth.

The basis for this holding was the finding that the structure and organization of the local department is so intertwined with the state department to warrant a finding that the local department is the alter ego of the state department. The Court found that the Commonwealth of Virginia provided 80% of the funding for most of the local department's operations. The court further found that the Commonwealth of Virginia would be responsible for 80% of the payment of any judgment and that this payment of damages would necessarily affect the state treasury. Thus, the court concluded, recovery against the local department or the board would violate the Eleventh Amendment. A20-22. This finding was the basis for Ms. Bockes appeal to the Fourth Circuit.

The District Court also held that the members of the board in their individual capacity were entitled to qualified immunity. This holding was not appealed by Ms. Bockes and is scarcely mentioned in her petition, however, it is crucial to a proper understanding of the opinion of the Fourth Circuit.

The Court of Appeals affirmed the District Court's holding of Eleventh Amendment immunity for the Grayson County Department of Social Services. The Court of Appeals concluded that the Commonwealth of Virginia provided 80% of the funding for most of the local department's operations. The court further found that the Commonwealth of Virginia would be responsible for 80% of the payment of any judgment and that this payment of damages would necessarily affect the state treasury. As Ms. Bockes did not appeal the grant of qualified immunity to the board members in their official capacities, the Court of Appeals was faced only with an official capacity

action for damages. As such, the Court of Appeals affirmed the District Court's ruling that the local board and local department is an agency of the Commonwealth of Virginia for Eleventh Amendment purposes. A7-9.

With respect to the County, the Court of Appeals held that due to the domination of personnel policy by the state, the county was pre-empted from regulating personnel policy for the local department. The authority to regulate personnel policy with respect to personnel matters is retained by the State Board. A9-10. The respondents contended before the Court of Appeals that under state law at the time of Ms. Bockes' termination she had no reasonable expectation of continued employment. Alternatively, the county contended that if Ms. Bockes did have such an expectation, the actions of the local board constituted random and unauthorized actions as defined under *Parratt v. Taylor*, 451 U.S. 527 (1981), and that the grievance procedure remedied any deprivations suffered by Ms. Bockes. The Court of Appeals did not address these issues. A10. The Court of Appeals denied Ms. Bockes' petition for rehearing. A28-29.

SUMMARY OF THE ARGUMENT

The Eleventh Amendment bars an action in federal court for the recovery of money from the state. *Edelman v. Jordan*, 415 U.S. 651 (1974). It is undisputed that any recovery in this case would constitute a recovery from the Commonwealth of Virginia. The reliance of Ms. Bockes upon the cases which provide that a state may not extend

Eleventh Amendment protection to its employees in their individual capacities through promises of indemnity is misplaced. This line of cases, referred to by Ms. Bockes as the indemnity cases, arose from this Court's ruling in *Ex Parte Young*, 209 U.S. 123 (1908). Due to the fact no officials in their individual capacities were before the Court of Appeals, the rationale of *Ex Parte Young* and the indemnity cases, is not applicable to the present situation.

The Virginia State Department of Social Services extensively regulates policy respecting the personnel of local departments of social services. By virtue of the state department's 840 page regulatory personnel manual, the state pre-empts counties from the entire personnel field.

> "[T]he key issue in identifying a policymaker is a question not of who possesses final control over policy in form or theory, but rather of who wields that authority in fact."

Morrash v. Strobel, 842 F.2d 64, 68 (1987), (Citation omitted).

It is clear that the *State Board*, by and through its personnel regulations, wields the actual authority over personnel policy decisions. Any policy made by the local board is attributable only to the state.

Ms. Bockes presents no true conflict between the Court of Appeals' decision and any decisions of other Courts of Appeals or state courts of last resort. The decision of the Court of Appeals is not in conflict with any decisions of this Court. The Court of Appeals for the Fourth Circuit presently has at least one case before it which will help define the scope of its Eleventh Amendment decision in this case.

ARGUMENT

It is well settled that the Eleventh Amendment bars liability of certain officials when the practical effect of the liability would be the same as a judgment against the state. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 123, n. 34, (1984). "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). When relief is sought nominally against an officer or agency of the state it is in fact against the sovereign if the decree would operate against the state. *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (per curiam). The Eleventh Amendment does not bar an action against a state official or employee individually for his tortious conduct. *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 50-51 (1944). However, a lawsuit against an official in his official capacity only is actually a lawsuit against the office and the governmental entity itself. *Revene v. Charles County Commissioners*, 882 F.2d 870, 874 (4th Cir. 1989). The District Court determined that the members of the local board, by consulting an attorney prior to the termination of Ms. Bockes, acted objectively reasonable and were entitled to qualified immunity in their individual capacities. A13. Ms. Bockes did not appeal this determination. As such, for Eleventh Amendment purposes, the only remaining defendants were the local board, and the local department, both governmental agencies. The case before the Court of Appeals was an appeal of a decision in favor of governmental agencies. The question

presented was whether these agencies were agencies of the state for Eleventh Amendment purposes.

The Court of Appeals' decision was based primarily upon the Commonwealth of Virginia's funding of 80% of the administrative operating costs of local social services departments, including the refund of 80% of the premium cost of a state held and operated liability insurance plan. A7-9. The Public Officials Liability Self-Insurance Plan, or POLSIP, is administered by the Commonwealth of Virginia, Department of General Services, Division of Risk Management. A41-42. The amount of premium paid by the state, if any, varies with respect to the type of agency or political subdivision. Although 2.1-526.8:1, the statute which creates the POLSIP, provides for no state contributions, the undisputed evidence is that for social services departments, the state essentially pays 80% of the premium costs and that any judgment paid under the policy would be taken from a fund established by payment of these premiums. A40, 49.

The assets of the plan are invested by the Treasurer of the Commonwealth and the fund is held in the name of the Commonwealth. A check for the satisfaction of any judgment against the plan must be signed by the Treasurer of the Commonwealth. A41-42. Any judgments paid under the POLSIP come directly from the funds that have been paid in for each type of agency. A41-42.

The District Court found that a judgment against the department of social services would "inexorably affect the state treasury as a majority of state money was paid into the insurance fund . . . " A21. This holding was affirmed by the Court of Appeals. A8. Ms. Bockes does

not contest the determination that state money is paid into the fund on behalf of the local department. Ms. Bockes does not contend that none of this state money would be used to satisfy any judgment against the department. Rather, Ms. Bockes focuses upon the nature of the state payments and argues that under the Court of Appeals' decision, the state essentially allows departments to "purchase" Eleventh Amendment protection. *Petition*, 11. As will be examined, this argument relies primarily upon assumption and speculation. Ms. Bockes cites no authority which conflicts with the Court of Appeals' decision.

The thrust of Ms. Bockes' argument on the Eleventh Amendment issue is based upon comparisons to cases which have held that the promise by a state to indemnify its officials can not be held to extend the state's immunity to the official if the official is facing liability in his individual capacity. See e.g., *Blaylock v. Schwinden*, 862 F.2d 1352 (9th Cir. 1988); *Benning v. Board of Regents of Regency Universities*, 928 F.2d 775; *Wilson v. Beebe*, 770 F.2d 578, (6th Cir. 1985). These cases, referred to by Ms. Bockes as the indemnity cases, simply hold that a state cannot extend its immunity to officials in their individual capacities.

The indemnity line of cases are based primarily on this Court's decision in *Ex Parte Young*, 209 U.S. 123 (1908). In that case, the Court stated that when a state officer acts in a manner violative of the Constitution, he

> "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character

> and is subjected *in his person* to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. (Emphasis added).

Ex Parte Young, 209 U.S. at 159, 160. See also, *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47 (1944) and *Scheuer v. Rhodes*, 416 U.S. 232 (1974). The essence of these cases is that a state official's actions can sometimes strip the official of state authority. The official then is not considered a state official and is personally responsible for his actions. When the official is stripped of his state authority, a voluntary agreement to indemnify the official in his individual capacity cannot suffice to extend the state's immunity to the individual. Such is the reasoning of the indemnity cases. This case, however, did not involve a situation where an official had been stripped of the authority of the state as a result of his actions. When the District Court entered judgment in favor of the individuals and this decision was not appealed, Ms. Bockes had only one pocket available from which to recover money. It is undisputed that any money inside that pocket came from the state. " . . . [I]t is clear that the doctrine of *Ex Parte Young* is of no aid to a plaintiff seeking damages from the public treasury . . . " *Scheuer*, 416 U.S. at 238. See also, *Edelman v. Jordan*, 415 U.S. 651 (1974).

The indemnity cases offer no precedent of value in this case. If the courts in the indemnity cases had before them facts like those in the present case (an action against an official *only* in his official capacity), then undoubtedly

the Eleventh Amendment would have precluded any judgment if the judgment was to be paid from state funds. Further, if there were any doubt in the indemnity cases as to whether the official was a state official or a local official, surely the state's willingness to indemnify the official would be a persuasive indication that the official was a state official. Likewise, in the present case, it is difficult to imagine why the state would willingly agree to provide funds for insurance against liability for the actions of the departments of social services and the local board members in their official capacities if the state did not believe itself potentially liable for those actions.

Ms. Bockes relies heavily on her affidavit, which states that it is her "understanding" that the county would be liable for the payment of any judgment in the absence of insurance. The basis of this "understanding" is not provided. This portion of Ms. Bockes' affidavit is essentially a lay opinion and a conclusion of law. It was provided *after* a trial on the merits, without an opportunity for cross-examination. This "understanding" is especially unpersuasive in light of state law. It is undisputed that the state pays the vast majority of all expenditures of local departments. This "understanding" is also in conflict with the letter of November 14, 1986 from the State Department of Social Services to local directors/superintendents. A49-50. The letter states that if the local departments were then covered by the local city or county's legal liability insurance, this coverage would cease in the future. A49, paragraph 3. This "understanding" also defies common sense. If a county would be the

responsible party for a judgment against a local department, it would not be logical for the state to be willing to provide the funding for liability insurance when the county has the authorization and the means to raise its own funds.

Ms. Bockes further argues that the decision of the Court of Appeals can be interpreted to extend Eleventh Amendment protection to counties, cities, and towns and that the decision creates a distinction between identical agencies with respect to the Eleventh Amendment.

Ms. Bockes states:

> "Under the Court of Appeals' decision, any political subdivision in the Commonwealth which buys into the insurance plan of section 2.1-526.8:1 is a state agency protected by the Eleventh Amendment, regardless of any other facts about the connection between the entity and the Commonwealth . . . The decision . . . creates the potential that some county social services boards in Virginia will be protected by the Eleventh Amendment and others who have not made the same arrangements for liability insurance will not."

Petition, Page 16.

This forecast is dubious. First, the premium rates paid by the state, if any, vary according to the type of political subdivision involved. A41-42, *Code of Virginia*, Section 2.1-526.8:1. If a party for which the state does not contribute to the premiums comes before a federal court, then certainly the policy will be no basis for Eleventh Amendment protection. Second, Ms. Bockes presumes that the presence or absence of state funded insurance is

the only factor in all cases. This necessarily presumes that absent state funded insurance, a department of social services would not have sufficient connection to the state to be determined a state agency for Eleventh Amendment purposes. This is simply not the case. Although the effect of a judgment on the state treasury was the deciding factor in this case, the absence of such a direct effect will mandate that other factors be considered. Whether an agency is an agency of the state for Eleventh Amendment purposes must be decided on a case by case method. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280 (1977), (listing factors to be considered in determination).

As Ms. Bockes correctly points out, the Fourth Circuit currently has before it *Holland v. Rimmer*, Docket No. 93-1447. *Petition*, 16. Also, as Ms. Bockes points out, the Fourth Circuit will be forced to determine the breadth of its holding in the present case. In *Holland*, the appellant contends that the Buchanan County Department of Social Services is not entitled to Eleventh Amendment immunity because it did not participate in the POLSIP plan. To determine whether a non-participating department is an agency of the state, the Court of Appeals will most likely examine the characterization of the agency under state law; the extent of state control over the agency; the dependence of the agency on state appropriations; and the effect of a judgment on the state treasury. *Keller v. Prince George's County*, 827 F.2d 952, 964 (4th Cir. 1987); *Mt. Healthy*, 429 U.S. at 280. This examination will reveal that regardless of the presence of state funded insurance, local departments of social services are agencies of the Commonwealth for Eleventh Amendment purposes and

that even if the Fourth Circuit's reliance on the POLSIP plan is overstated, this reliance is harmless error.

By operation of the *Code of Virginia*, the Virginia Department of Social Services dominates the welfare system in Virginia. By statute, the Commissioner of Social Services for the Commonwealth of Virginia may require local boards to file any reports the Commissioner may deem necessary relating to the administration of the welfare system in Virginia. *Code of Virginia*, Section 63.1-33. The Commissioner mandates the form and submission schedule of applications, reports, affidavits, budgets and any other forms required to be filed by the local boards. *Id.* The Commissioner is charged with review of budget requests by the local boards and the commissioner may **make any modifications** consistent with the requirements of the Code. *Id.* Section B. (Emphasis added). The Commissioner shall have access at all times to the records of the local boards concerning virtually every aspect of the administration of the welfare system. *Code of Virginia*, Section 63.1-34. The Commissioner shall enforce the entrance and performance standards established by the State Board for personnel employed in the administration of the welfare system and remove each employee who does not meet such standards. *Code of Virginia*, Section 63.1-37.

The State Board of Social Services mandates rules and regulations necessary or desirable to carry out the purposes and intent of the welfare system in Virginia. Local boards are subject to those rules and regulations. *Code of Virginia*, Sections 63.1-25, 63.1-50. Any person aggrieved by a decision of a local board may appeal to the State Board. *Code of Virginia*, Section 63.1-116. The

State Board, **upon its own motion,** may review any action by a local board, and may consider any application for assistance upon which a decision is not made by the local board within a reasonable time. *Code of Virginia,* Section 63.1-118. (Emphasis added).

Volume 1A, the Virginia Department of Social Services publication from which the District Court found that Ms. Bockes gained a property interest in her employment, is an extensive body of rules and regulations concerning every facet of personnel management for the local boards. A43-48. Volume 1A consists of two separate volumes, each approximately three inches thick, consisting of a total of more than 840 pages.

Volume 1A states as its purpose:

> "The State Board of Social Services establishes and maintains the standards and policies that provide the foundation of the Local Personnel System. Administrative rules and procedures for implementation of the State Board policies are developed by the State Department of Social Services. The Commissioner of the State Department of Social Services is responsible for making certain that the personnel polices, administrative rules and procedures are properly maintained and administered. He must also ensure that local welfare/social services departments comply with the provisions of the personnel plan."

Volume 1A, Chapter A, Page 1, A43.

Volume 1A contains a statement of State Board Policy within each section. One such statement of policy provides:

> "The Virginia Department of Social Services is responsible for providing a personnel system encompassing all aspects of personnel; selection, classification, compensation, administration, and employee relations which complies with appropriate federal and State laws and regulations."

Volume 1A, Chapter A, Page 2, A45.

The Grayson County Department of Social Services is dependant upon funding from the Commonwealth of Virginia. While Section 63.1-91 of the *Code of Virginia* provides that local board's of supervisors shall appropriate such sums of money as shall be sufficient to provide for the full range of social services, Section 63.1-92 provides for reimbursement from the Commonwealth of expenditures by the localities. The Commonwealth pays 80% of the salaries of the local departments. The Commonwealth pays 80% of the employees health insurance premiums. A60-61, 63. The Commonwealth even pays the rent and overhead for office space for the local department. *Code of Virginia*, Section 63.1-92. Where localities qualify for federal assistance grants and appropriate local money in reliance on these grants, the Commonwealth has, since 1972, reimbursed localities fully for the amounts of the grants after crediting the amount of the federal grant. *Code of Virginia*, Section 63.1-92. There can be no doubt that the local departments' ability to function and provide services depends primarily upon state funding.

Further, as the District Court found, "local boards of social services have not attained the local, independent status traditionally afforded other local boards." A22. No statutory provisions exist to create the board of social services as a body corporate. No statutory provisions exist for the local board or department to raise funds. They can not issue bonds or levy taxes. They depend exclusively upon funding from other sources.

The statutory foundation, financial support, and intensive regulation of social services in Virginia establishes that local departments of social services are agencies of the state for Eleventh Amendment purposes. The statutory foundation also establishes that if the Court of Appeals was in error with respect to the insurance policy, the error was harmless.

Ms. Bockes argues "if the Court of Appeals decision is not reversed, this two-headed position by the Division of Risk Management allows the Local Departments . . . the best of both worlds: a Local Department cannot be sued in state court because it is not a state agency as to which sovereign immunity has been waived, yet at the same time it could not be sued in federal court because it is a state agency protected by the Eleventh Amendment." *Petition*, 20. This argument is pure speculation. The position of the Division of Risk Management referred to by Ms. Bockes is contained in a letter from a claims adjuster at the Division of Risk Management. A51. The letter states that it is simply the adjuster's "opinion" that the local department is not a state agency for purposes of the Virginia Tort Claims Act. The letter also mysteriously states that the addressee was referred to the Division of Risk Management because "this office now

handles claims made against agencies of the Commonwealth." A51. In any event, this "opinion" has apparently not been tested in either federal or state court. It is truly novel for Ms. Bockes to give the opinion of an insurance claims adjuster, in an adversarial situation, the weight of judicial authority.

Ms. Bockes cites no authority which conflicts with the Court of Appeals' decision in this case. Her reliance on the indemnity cases is misfocused. Any misconceptions about the breadth of the Court of Appeals' decision will most likely be resolved in the near future in the cases presently before the Court of Appeals.

ANY POLICY MADE BY THE LOCAL BOARD IN THE TERMINATION OF MS. BOCKES IS ATTRIBUTABLE TO THE STATE RATHER THAN TO GRAYSON COUNTY

For municipal liability to be found under 42 U.S.C. Section 1983, it must be shown that the execution of a municipal policy or custom inflicts an injury. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978). A county can be held responsible for a violation of Section 1983 if it can be shown that the violation occurred because of persistent widespread practice of county officials that becomes so well settled as to constitute custom that fairly represents county policy. *Coon v. Ledbetter*, 780 F.2d 1158 (5th Cir. 1986).

The decision of a single policy making official may give rise to municipal liability if that official is responsible for establishing final government policy respecting such activity. *Pembaur v. Cincinnati*, 475 U.S. 469, 482, 483,

106 S.Ct. 1292, 1299, 1300 (1986). However, the fact that a policy-making official or policy making body has discretion in the exercise of particular function does not, without more, give rise to municipal liability. *Pembaur*, 475 U.S. at 481-482.

As the Court of Appeals correctly determined, the local board is *not* responsible for establishing final governmental policy with regards to personnel. Due to the massive volume of personnel regulations promulgated and enforced by the State Board, it is clear that the *State Board*, and not the County or local board, wields the actual authority over personnel policy decisions.

> "[T]he key issue in identifying a policymaker is a question not of who possesses final control over policy in form or theory, but rather of who wields that authority in fact."

Morrash v. Strobel, 842 F.2d 64, 68 (1987), (Citation omitted).

The local board is subject to the rules and regulations of the State Board of Social Services. *Code of Virginia*, Section 63.1-50. Volume 1A falls under this category of rules and regulations. *Code of Virginia*, Section 63.1-25, 50. Volume 1A regulates virtually every facet of personnel administration for the local departments.

> "The State Board of Social Services establishes and maintains the standards and policies that provide the foundation of the Local Personnel System. Administrative rules and procedures for implementation of the State Board policies are developed by the State Department of Social

> Services. The Commissioner of the State Department of Social Services is responsible for making certain that the personnel polices, administrative rules and procedures are properly maintained and administered. He must also ensure that local welfare/social services departments comply with the provisions of the personnel plan."

Volume 1A, Chapter A, Page 1, A43. It is clear that the State Board mandates personnel policy for the local departments and that local boards are subject to state control with respect to personnel policy. Through a selective listing of statutory provisions, Ms. Bockes attempts to show that the County has control over the actions of the Local Department. *Petition*, 21-24. As was set out above, it is clear that the State has the authority to exhibit greater control than the County. See supra, 19-22. Nowhere in the list of statutes cited by Ms. Bockes has the County been given the authority or control to effect personnel decisions of the local board. This is because control over personnel policy has been retained by the State Board of Social Services and the control is wielded through its massive body of personnel regulations, Volume 1A.

The County could not effect the personnel decisions of the Local Department even if it wanted to do so. In Virginia, the authority of municipal bodies to act is expressly limited to the authority granted to them by the general assembly, the authority necessarily implied from the grant, and the authority which is essential and indispensable. *County of Fairfax v. Southern Iron Works, Inc.*, 242 Va. 435, 410 S.E.2d 674 (1991). The authority of municipal bodies to act is expressly limited to actions not in conflict

with State law. *Code of Virginia,* Section 1-13.17. Where Volume 1A is not in conflict with the laws and Constitution of the United States or the Commonwealth, it has the effect of state law. *Code of Virginia,* Section 63.1-25. Personnel policy of the local departments has been left to the State Board and the County has been pre-empted from the entire personnel field.

Ms. Bockes argues that the local board's decision to terminate her is "final" in that Ms. Bockes had no further avenue with which to appeal this decision. She argues that the finality of this decision makes the board the "final arbiter" of policy for Grayson County. *Petition,* 27-28. Ms. Bockes' argument is flawed because it necessarily presumes that the Local Department is always an agency of the County. It is clear that with respect to decisions respecting personnel, if the local board makes policy, it is making policy only for the state. In other words, as the Court of Appeals correctly found, if the decision of the local board is attributable to anyone other than the local board, it is attributable to the State Department of Social Services, which establishes and maintains the standards and policies that provide the foundation of the Local Personnel System.

Ms. Bockes' reliance on the plurality opinion in *City of St. Louis v. Propotnik,* 485 U.S. 112 (1988), is simply misplaced. In *Propotnik,* the Court essentially held that when a municipality's actual practices differ from its expressly stated policies, the practices represent the actual policy. 485 U.S. at 130-31, 145 n.7. In that case, the practices in question were within the realm of the municipality's ability to control policy, even if the effect of the control violated the Constitution. In the present case, it is

clear that the county had no ability to affect personnel policy.

Nowhere does Ms. Bockes cite authority in which a municipal body been held accountable for implementation of a policy which was explicitly reserved to another governmental body. In each case cited by Ms. Bockes, the municipal body was held accountable because the policy contested was within the realm of the municipal body's authority to effect and control, *even if* the effect of the policy violated law or the Constitution. Except to aliege that Ms. Bockes was terminated by a board with members appointed by the Grayson County Board of Supervisors (in violation of a policy enacted by an agency of the Commonwealth of Virginia), the petitioner has cited no policy of the county was followed, or violated, in the termination of Ms. Bockes.

CONCLUSION

As the Court of Appeals correctly found, it is clear that Ms. Bockes is seeking recovery of money from the Commonwealth of Virginia through the Grayson County Department of Social Services. The Grayson County Department of Social Services is an agency of the state for Eleventh Amendment purposes. It is also abundantly clear that any policy made by the Grayson County Board of Social Services was policy of the state and not policy of Grayson County. For these reasons, the petition for writ of certiorari should not be granted.

In the District Court and before the Court of Appeals, the respondents contended that under state law at the time of Ms. Bockes' termination, she had no reasonable

expectation of continued employment and that no due process deprivation arose as a result of her termination. Alternatively, the respondents contended that if Ms. Bockes had a reasonable expectation of continued employment, the failure of the local board to comply with state regulations in the manner of her termination was a random and unauthorized act, as defined by the Court in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908 (1981) and *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194 (1984), and that the post-deprivation process remedied any deprivation suffered by Ms. Bockes. Although these arguments were not addressed by the Court of Appeals and are not issues raised in Ms. Bockes' Petition, the respondents hereby request permission to address these issues if the Court grants a Writ of Certiorari in this case.

Respectfully submitted,

ROBERT V. WARD

Attorney for the Respondents

DATED: December 27, 1993

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NANCY BOCKES,

Plaintiff-Appellant,

v.

BETTYE LOU FIELDS, Individually and as a member and Chairman of the Board of Social Services, Grayson County, Virginia; ROBERT WELLS, Individually and as a member of the Board of Social Services, Grayson County, Virginia; DENNIS COOLEY, Individually and as a member and Vice-Chairman of the Board of Social Services, Grayson County, Virginia; DEPARTMENT OF SOCIAL SERVICES, Grayson County, Virginia,

Defendants-Appellees.

and

COUNTY OF GRAYSON, VIRGINIA,

Defendant.

No. 92-2047

NANCY BOCKES,

Plaintiff-Appellee,

v.

COUNTY OF GRAYSON, VIRGINIA,

Defendant-Appellant,

and

Bettye Lou Fields, Individually and as a member and Chairman of the Board of Social Services, Grayson County, Virginia; ROBERT WELLS, Individually and as a member of the Board of Social Services, Grayson County, Virginia; DENNIS COOLEY, Individually and as a member and Vice-Chairman of the Board of Social Services, Grayson County, Virginia; DEPARTMENT OF SOCIAL SERVICES, Grayson County, Virginia,

Defendants.

No. 92-2072

Appeals from the United States District Court
for the Western District of Virginia, at Abingdon.
Samuel G. Wilson, District Judge.
(CA-91-62-A)

Argued: June 8, 1993

Decided: July 26, 1993

Before WILKINSON, Circuit Judge, SPROUSE, Senior Circuit Judge, and G. ROSS ANDERSON, JR., United States

District Judge for the District of South Carolina, sitting by designation.

Affirmed in part, reversed in part, and remanded with instructions to dismiss by published opinion. Judge Wilkinson wrote the opinion, in which Senior Judge Sprouse and Judge Anderson joined.

COUNSEL

ARGUED: Kurt Joseph Pomrenke, WHITE, ELLIOTT & BUNDY, P.C., Bristol, Virginia, for Appellant. Robert Vincent Ward, LAW OFFICES OF ROBERT V. WARD, P.C., Bristol, Virginia, for Appellees. **ON BRIEF:** Steven R. Minor, WHITE, ELLIOTT & BUNDY, P.C., Bristol, Virginia, for Appellant.

OPINION

WILKINSON, Circuit Judge:

This case poses two questions about the amenability of governmental bodies to suit in federal court – here an action claiming termination from employment without due process. The first question is whether the Board of Social Services for Grayson County, Virginia and the Department of Social Services for Grayson County are state entities, and thus immune from suit in federal court under the Eleventh Amendment. We hold that they are immune, because their liability to plaintiff would be covered by an insurance plan funded by the state. The second question is whether Grayson County can be held responsible under 42 U.S.C. § 1983 for the personnel decisions of the Board. We hold that it cannot, because

the Board did not dismiss plaintiff pursuant to any County policy. We accordingly affirm the district court on the first question, reverse it on the second question, and remand with instructions that plaintiff's claim be dismissed. Plaintiff must be satisfied with the extensive grievance procedures provided by the Commonwealth of Virginia, which she has already pursued with some success.

I.

The Commonwealth of Virginia has established a complicated scheme for administering its social services programs. At the top is the Commissioner of Social Services, who is appointed by the Governor of Virginia. Va. Code § 63.1-2. The Commissioner manages the Department of Social Services for the entire state. *Id.* at § 63.1-1.1. A nine-member State Board of Social Services, also appointed by the Governor, advises the Commissioner. *Id.* at §§ 63.1-14, 63.1-24.

The counties and cities in Virginia have local departments of social services as well, which help to implement the programs enacted by the Commonwealth. Va. Code § 63.1-38.1. The local departments are overseen by local boards of social services, which are appointed by the counties or cities. *Id.* at §§ 63.1-38, 63.1-38.1. The local board selects a local director, who administers social services on a day-to-day basis. *Id.* at §§ 63.1-59, 63.1-60.

The Commissioner and State Board of Social Services retain ultimate authority over personnel decisions at both the state and local level, however. The State Board has the duty to "establish minimum entrance and performance

standards for the personnel employed by the Commissioner, local boards and local superintendents." Va. Code § 63.1-26. The Commissioner is required to "remove each employee who does not meet such standards." *Id.* at § 63.1-37. While local department employees "serve at the pleasure of the local board," the local board must adhere to guidelines promulgated by the State Board when it hires and fires personnel. *Id.* at § 63.1-61. "Members of any local board may be suspended or removed for cause by the State Board." *Id.* at § 63.1-45.

Plaintiff Nancy Bockes served for thirteen years as Director of the Grayson County Department of Social Services (the "Department"). In June of 1990, she was fired by the Grayson County Board of Social Services (the "Board"), without notice and without a pre-termination hearing. She then filed a grievance, using procedures prescribed by the Virginia Department of Social Services. A grievance panel ordered the Board to reinstate her as Director and to give her one-half backpay for the period during which she had no job.

Dissatisfied with the award, Bockes filed this § 1983 action seeking the other half of her backpay, plus damages for pain and suffering. She named the members of the Board as defendants, both in their individual and official capacities. She also named the Department and the County itself.

Bockes' case ultimately went to trial. At the close of the evidence on liability, the district court ruled that Bockes' position as Director was "permanent," and thus that the Fourteenth Amendment required the Board to

have given her a pre-termination hearing.[1] The court submitted the issue of damages to the jury, which awarded Ms. Bockes a total of $20,000: $13,000 for lost wages and benefits; $7,000 for pain and suffering.

The Board and the Department maintained that they were immune from suit in federal court because they were state entities under the Eleventh Amendment. The County maintained that it was not liable because the Board had not fired Ms. Bockes pursuant to any County policy. The district court granted judgment as a matter of law both to the Board and to the Department, agreeing that they were immune from suit under the Eleventh Amendment. *Bockes v. Fields*, 798 F. Supp. 1219, 1222-24 (W.D. Va. 1992). The court upheld the $20,000 verdict against the County, however, ruling that the Board's firing of Ms. Bockes was an official policymaking act attributable to the County. *Id.* at 1224-26.

Both sides appeal this judgment. Bockes appeals the ruling that the Board and the Department are immune from suit. The County cross-appeals the ruling that it is liable for the acts of the Board. All defendants maintain alternatively that the district court erred in ruling that Ms. Bockes was denied due process. We shall address each issue in turn.

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[1] The court also ruled that the Board members had qualified immunity in their individual capacities. Bockes does not appeal this ruling.

II.

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state." U.S. Const. amend. XI. This Amendment serves to curb overreaching by the federal judiciary into the internal affairs of a sovereign state. While the Eleventh Amendment on its face applies only to suits by citizens of a foreign state, it is now well established that an unconsenting state is immune from suits in federal court brought by its own citizens as well. *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974); *Hans v. Louisiana*, 134 U.S. 1 (1890). It is also well established that this immunity extends to state agencies and officials, when a monetary judgment against them would be paid from the state treasury. "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). "Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Edelman*, 415 U.S. at 663.

In this case, were we to hold the Board and the Department liable to Ms. Bockes, a substantial portion of that liability would be paid by the Commonwealth of Virginia. The Board and the Department subscribe to the Commonwealth's Public Officials Liability Self-Insurance Plan. Under this Plan, the Treasurer of Virginia manages a

separate trust fund which covers liability that subscribing agencies incur in the discharge of their duties. The Commonwealth pays 80% of the premiums that fund this Plan; the agencies the other 20%. Of the $20,000 judgment against the Board and the Department, the Plan would cover $10,500: $13,000 for Bockes' lost wages and benefits,[2] minus a $2,500 deductible.[3] And since the Commonwealth funds 80% of the Plan, 80% of this $10,500, or $8,400, would come ultimately from the Virginia treasury. The Eleventh Amendment bars this recovery.

Ms. Bockes attempt to avoid this conclusion. She asks us to consider other factors that this court has previously identified as relevant to determining whether an agency is a state entity for Eleventh Amendment purposes: the characterization of the agency under state law; the extent of state control over the agency; and the dependence of the agency on state appropriations. *See Keller v. Prince George's County*, 827 F.2d 952, 964 (4th Cir. 1987); *Ram Ditta v. Maryland Nat'l Capital Park & Planning Comm'n*, 822 F.2d 456, 457-58 (4th Cir. 1987). Certainly these factors should be considered in actions that seek remedies other than damages from state treasuries. *See, e.g., Ram Ditta*, 822 F.2d at 458-60 (considering other factors after determining that judgment against Planning Commission would not be paid from Maryland treasury). When the

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[2] The Plan does not cover Ms. Bockes' damages for mental anguish.

[3] It is not clear from the record whether the deductible would apply to this particular claim. We assume *arguendo* that it does.

action seeks damages that would be satisfied by state funds, however, no further inquiry is necessary.

We thus conclude that the Board and the Department are immune from suit in federal court by Ms. Bockes. That the Commonwealth would pay only part of the judgment against these defendants does not restrict our holding. Defendants' Eleventh Amendment immunity cannot turn on whether Bockes seeks damages for emotional distress, or other damages ancillary to her core claim that defendants denied her due process. The insurance plan funded by the Commonwealth covers this core claim. The Eleventh Amendment therefore bars the suit.

III.

Under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), a county may be liable for acts done pursuant to its "policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Id.* at 694. The district court found the Board's firing of Ms. Bockes to represent the "official policy" of Grayson County, because the County had the power to hire and fire the members of the Board. The County argues that this analysis is misfocused, because the Commonwealth, not the County, sets personnel policy for the Board.

We agree with the County. The relevant question is whether the Board acted as the County's designated "policymaking authority" when it fired Nancy Bockes. " '[P]olicymaking authority' implies authority to set and implement general goals and programs of municipal government, as opposed to discretionary authority in purely

operational aspects of government." *Spell v. McDaniel*, 824 F.2d 1380, 1386 (4th Cir. 1987). In Virginia, neither the County nor the local boards have authority to set "general goals and programs" for social services personnel; that authority is reserved for the State Board. *See* Va. Code §§ 63.1-26. The State Board has wielded this authority by publishing a comprehensive personnel handbook, which the local boards must follow. Among other things, this handbook requires the local boards to apply merit criteria in their personnel decisions. It even prescribes the grievance procedure that Ms. Bockes used in this case. In short, the Grayson County Board enjoyed its discretion to fire Ms. Bockes at the prerogative of and within the constraints imposed by the Commonwealth. Such bounded, state-conferred discretion is not the "policymaking authority" for which a county may be held responsible under § 1983.

IV.

In sum, we hold that the Board and the Department are immune from suit in federal court, and that the County is not liable for the actions of the Board. We thus need not address whether Ms. Bockes was deprived of due process by being fired without a pre-termination hearing, because none of the defendants are amenable to federal suit. Ms. Bockes must settle for the remedy afforded her by state law. The judgment of the district court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS TO DISMISS.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

NANCY BOCKES,

Plaintiff,

v.

BETTYE LOU FIELDS, ROBERT WELLS, AND DENNIS COOLEY, individually and in their official capacities as members of the Board of Social Services, Grayson County, Virginia, DEPARTMENT OF SOCIAL SERVICES, GRAYSON COUNTY, VIRGINIA, and COUNTY OF GRAYSON, VIRGINIA,

Defendants.

Civil Action No. 91-0062-A

FINAL ORDER

(Filed July 30, 1992)

In accordance with the court's rulings at trial and the court's memorandum opinion entered on this date, it is ADJUDGED and ORDERED that judgment be entered in favor of plaintiff, Nancy Bockes, and against defendant, Grayson County, Virginia, in the amount of $20,000, and that judgment be and the same is, hereby, entered in favor of defendants, the Department of Social Services of Grayson County, Virginia, and Bettye Lou Fields, Robert Wells, and Dennis Cooley in their individual and official capacities as members of the Board of Social Services of Grayson County, Virginia, and this case is ORDERED stricken from the docket of the court.

ENTER this 29th day of July, 1992.

/s/ Illegible
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

NANCY BOCKES,

Plaintiff,

v.

BETTYE LOU FIELDS, ROBERT WELLS, AND DENNIS COOLEY, individually and in their official capacities as members of the Board of Social Services, Grayson County, Virginia, DEPARTMENT OF SOCIAL SERVICES, GRAYSON COUNTY, VIRGINIA, and COUNTY OF GRAYSON, VIRGINIA,

Defendants.

Civil Action No. 91-0062-A

MEMORANDUM OPINION

(Filed July 30, 1992)

After thirteen years as Director of Social Services of Grayson County, Virginia, a position classified as "permanent" by the Department of Social Services personnel manual, plaintiff, Nancy Bockes ("Bockes"), was terminated without notice and a pre-termination hearing.

Following a post-termination hearing nearly a year later, a grievance panel found the termination to be improper. The grievance panel, however, did not order full backpay. Alleging that she was entitled to notice and a hearing before being discharged, Bockes brought this action against Grayson County, Virginia (the "County"), the Grayson County, Virginia Department of Social Services (the "Local Department"), and the members of the Grayson County, Virginia Board of Social Services, Bettye Lou Fields, Robert Wells, and Dennis Cooley, individually and in their official capacities (collectively "the Local Board"). The case was tried by a jury. At the conclusion of the evidence on liability, the court found that Bockes had a property interest, which entitled her to the protections of procedural due process under the Fourteenth Amendment. The court found, however, that the Local Board members had qualified immunity in their individual capacities.

The Local Department and the Local Board members in their official capacities argued that the Eleventh Amendment precluded an award of damages against them. They also argued that even if they had no Eleventh Amendment immunity, they could not be held liable because Bockes was not fired "pursuant to a policy, custom or usage," a prerequisite to liability under *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978). The County argued that it could not be held liable because the Local Department is a state agency, not a county agency, and that even if the Local Department were not a state agency, Bockes was not fired "pursuant to a policy, custom or usage" of the County. The court took the matter

under advisement and submitted the question of damages to the jury by way of special interrogatory.[1] The jury awarded compensatory damages of $20,000. For the reasons that follow, the court now finds that the Eleventh Amendment precludes a damage award against the Local Department and the Local Board but concludes that the County is liable for the jury verdict of $20,000.

I.

Bockes was employed as director of the Local Department from 1977 to 1990. The Local Personnel Administrative Manual ("Volume IA") for the Local Department classifies the position as "permanent." According to Volume IA, a "permanent position is a position of indefinite duration; there is no expiration date on such positions," and a permanent employee may be terminated only for cause. On June 8, 1990, the Local Board met with Bockes and told her that they had "lost confidence" in her. The Local Board then gave Bockes the option of resigning or being fired. Before responding, Bockes asked to make a phone call. After receiving advice from her lawyer, Bockes asked the Local Board to list the reasons for her dismissal in writing and to give her an opportunity to

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[1] The parties stipulated that the following damages were incurred by Bockes:

Health Premiums	$ 1,557.39
Travel	$ 441.00
Court Reporter	$ 1,392.00
Lost Wages	$ 9,770.89
Total	$13,161.28

respond. The Local Board declined on advice of counsel, and after Bockes refused to resign, the Local Board fired her. Bockes filed a grievance pursuant to Va. Code Ann. §§ 2.1-110-116. The grievance panel ordered the Local Board to reinstate Bockes and awarded her one-half of her backpay. Bockes then filed ~~this~~ suit to recover her remaining backpay as well as compensatory damages, alleging that the Local Board had violated her due process rights by not notifying her of the reasons for her termination and by not giving her an opportunity to respond to those reasons before her termination.

II.

As the court stated at trial, based upon the evidence presented, Bockes was a "permanent employee" with the Local Department, which gave Bockes a property interest in her job.[2] This property interest entitled Bockes to receive procedural due process. *See Cleveland Bd. of Educ.*

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[2] The wisdom of insulating a department head by classifying his or her position as a "permanent" position might be subject to debate. This, however, is not the forum for that debate. This court's role is limited to determining whether Bockes had a legitimate expectation of continued employment founded in state law, *Bishop v. Wood*, 426 U.S. 341 (1976), whether by statute, *Detweiler v. Virginia Dep't of Rehabilitative Services*, 705 F.2d 557, 590-60 (4th Cir. 1983), by contract, *Perry v. Sindermann*, 408 U.S. 593, 601 (1972), or by rules or mutually explicit understandings that support a claim of entitlement. At trial, the court determined as a matter of law that the department personnel manual created a mutually explicit understanding supporting a claim of entitlement. *See Bradley v. Colonial Mental Health & Retardation Services Bd.*, 856 F.2d 703, 707-08 (4th Cir. 1988).

v. Loudermill, 470 U.S. 532, 541 (1985). Procedural due process required that Bockes receive notice and "some kind of a hearing" before discharge. *See id.* at 542. Bockes received neither.

At trial the defendants argued that the actions of the Local Board were "random and unauthorized," and therefore, *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part by, Daniels v. Williams*, 474 U.S. 327 (1986), not *Loudermill*, governs. Under *Parratt*, post-deprivation remedies may be sufficient to satisfy due process if the conduct complained of is random and unauthorized. *Id.* at 543-44. However, as the Court of Appeals for the Fifth Circuit stated, to apply *Parratt:*

> the deprivation must truly have been unpredictable or unforeseeable; the pre-deprivation procedures must have been impotent to counter the state actors' particular conduct; and the conduct must have been "unauthorized" in the sense that it was not within the officials' express or implied authority.

Caine v. Hardy, 943 F.2d 1406, 1413 (5th Cir. 1991) (citing *Zinermon v. Burch*, 494 U.S. 113, 132-35 (1990)). As noted by the court at trial, the absence of any one of those elements would preclude the court from applying *Parratt*. *See id.*

Plumer v. Maryland, 915 F.2d 927 (4th Cir. 1990), is instructive. Following an informal administrative hearing in which Plumer was shown an anonymous letter that accused Plumer of continual drunk driving, Tami Plumer's motor vehicle license was suspended by the Maryland Motor Vehicle Administration "pending clearance by the Medical Advisory Board." Rather than appeal

the suspension to the circuit court, Plumer filed a § 1983 action in the United States District Court for the District of Maryland claiming that her due process rights under the Fourteenth Amendment had been violated. The district court dismissed Plumer's due process claim, finding that the suspension of Plumer's license was a result of a "random and unauthorized act" for which Maryland provided an adequate post-deprivation remedy by way of appeal to the circuit court. Although the court of appeals affirmed because it found no due process violation, it concluded that *Parratt* could not be applied.

According to the Fourth Circuit, "[i]n response to some confusion in the courts of appeal regarding the scope of the *Parratt* doctrine, the Supreme Court recently reemphasized *Parratt's* narrow scope" in *Zinermon v. Burch*, 494 U.S. 113 (1990). *Plumer*, 915 F.2d at 929 (footnote omitted). The Fourth Circuit expressly agreed with the Fifth Circuit as to "[t]he lesson of *Zinermon*":

> "[T]he *Parratt/Hudson* doctrine is restricted to cases where it truly is impossible for the state to provide predeprivation procedural due process before a person unpredictably is deprived of his liberty or property through the unauthorized conduct of a state actor." *Caine v. Hardy*, 905 F.2d 858, 862 (5th Cir. 1990). We agree, and so conclude that *Parratt* is inapplicable to Plumer's suit against the state. Under *Zinermon*, as we concluded recently, we must "first ask whether the risk of an erroneous deprivation was foreseeable, and next whether predeprivation safeguards would have any value in guarding against the kind of deprivation . . . allegedly suffered." *Fields v. Durham*, 909 F.2d 94, 97 (4th

> Cir. 1990) (*Fields II*) (quoting *Zinermon*, 110 S.Ct. at 988).

Id. at 930. In the Fourth Circuit's opinion, "the risk of an erroneous license deprivation clearly was foreseeable" and procedural safeguards were practicable making *Parratt* inapplicable. *Id.* at 931. Moreover, according to the court:

> the conduct of the state employees here was not "unauthorized," for the state has delegated to its employees "the power and authority to effect the very deprivation complained of here, . . . and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful [termination]."

Id. (quoting *Zinermon*, 110 S. Ct. 975, 990 (1990)). Thus, Bockes' termination without a sufficient pre-termination hearing does not fall within, in the words of the Fourth Circuit, "*Parratt's* narrow scope." *Id.* at 929. As in *Plumer*, pre-deprivation process, rather than a post-deprivation remedy, was required under *Zinermon* because pre-deprivation process was possible and the state delegated to the Local Board the power to effect the very deprivation about which Bockes complained.

III.

The court next must consider whether the Eleventh Amendment precludes Bockes from recovering a judgment against the Local Department and the Local Board

because the Local Department is a state agency.[3] The Eleventh Amendment protects unconsenting states "against a private party's suit for damages." *Keller v. Prince George's County* (Keller II), 923 F.2d 30, 32 (4th Cir. 1991) (citations omitted). It is well settled that "any arm of the state is protected by such immunity." *Id.* (citations omitted). "On the other hand, a municipality or other local government unit does not enjoy the protection of the eleventh amendment and may be sued under § 1983 for constitutional deprivations." *Keller v. Prince George's County* (Keller I), 827 F.2d 952, 963 (4th Cir. 1987) (citations omitted). Because the bar of the Eleventh Amendment cannot extend to the County, the question before the court on this score is whether the Local Department is the alter ego of the state for Eleventh Amendment purposes.

Bockes suggests the following factors are considered in determining the status of the Local Department under the Eleventh Amendment: "the characterization of the Department under state law; the extent of state control over the Department; the extent to which it depends on state appropriations; and whether a damage award would come from state funds." *Keller I*, 827 F.2d at 964

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[3] It is well recognized that suits against individuals in their official capacity are actually suits against the governmental entity itself. *Revene v. Charles County Comm'rs*, 882 F.2d 870, 874 (4th Cir. 1989) (citations omitted); *Giancola v. West Virginia Dep't of Public Safety*, 830 F.2d 547, 550 (4th Cir. 1987). Therefore, Bockes' suit against the Local Board members in their official capacities is nothing more than a suit solely against the Department. The court will couch its Eleventh Amendment analysis in terms of the County and the Department, but the analysis will necessarily encompass the Local Board as well.

(citation omitted). These factors all probe an entity's relative degree of autonomy from the state. *Ram Ditta v. Maryland Nat'l Capital Park and Planning Comm'n*, 822 F.2d 456, 457-58 & n.4 (4th Cir. 1987). However, "the most important consideration is whether the state treasury will be responsible for paying any judgment." *Ram Ditta*, 822 F.2d at 457; *see also Keller I*, 827 F.2d at 964.

According to the evidence presented in this case, if the Local Department were found liable, most of the judgment would be paid by the state. Of the $20,000 jury verdict in favor of Bockes, the state would be responsible for approximately $13,000. This amount would be paid out of the state's Public Officials Liability Self-Insurance Plan, which is managed by the Treasurer of Virginia, who holds the money for the plan in a separate insurance fund. All political subdivisions in Virginia, including the Local Department, are allowed to participate in the insurance plan, although participation is voluntary. Since the Local Board decided that the Local Department would participate in this state self-insurance plan, the Local Department pays a premium into the insurance fund "using a combination of state and local funds," with the state reimbursing the Local Department for 80% of the premium.

Bockes argues that since the damage award would be paid from a separate fund, there is no effect on the state treasury so as to afford the Local Department the protection of the Eleventh Amendment. That argument is misplaced on the record before the court. According to the evidence, the Local Department is reimbursed by the state for 80% of its premium payments. Due to the disparate amount of money provided by the state for the

premium payments, any judgment from the insurance fund will inexorably affect the state treasury as a majority of state money was paid into the insurance fund and would, therefore, be used to cover a judgment award against the Local Department. The fact that the insurance fund is separate from the general treasury is of no consequence. *See, e.g., Paschal v. Jackson*, 936 F.2d 940, 944-45 (7th Cir. 1991) (segregating state money into separate fund does not change fact that recovery is out of state treasury), *cert. denied*, 112 S. Ct. 992 (1992). The crucial inquiry is whether state funds will be used to pay for a damage award, which is clearly the case here. Accordingly, the court finds that a recovery of the $13,000 would be, in effect, a recovery of funds from the state prohibited by the Eleventh Amendment.[4]

The structure and organization of the Local Department and its relationship with the Virginia Department of Social Services ("the Virginia Department") also favors the finding that the Local Department should be treated as the states' alter ego for Eleventh Amendment purposes. First, although in Virginia, the Grayson County Board of Supervisors ("the County Board") appoints and

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[4] The court recognizes that the court of appeals has held that a damage award that would be satisfied from a separate unemployment compensation fund did not violate the Eleventh Amendment. *Brown v. Porcher*, 660 F.2d 1001, 1006-07 (4th Cir. 1981), *cert. denied*, 459 U.S. 1150 (1983). However, *Brown* involved no state money and, therefore, is not controlling. *See id.; see also Dyson v. Lavery*, 417 F. Supp. 103, 107-09 (E.D. Va. 1976) (college had judgment against it that could be satisfied out of student activities fee fund, which contained no state money, and therefore, college could not invoke Eleventh Amendment to prohibit retroactive damage award).

is authorized to remove the members of the Local Board, who, in turn, select the local director and employees, the Virginia Commissioner of Social Services ("the Commissioner") is expressly authorized to remove them. Va. Code Ann. § 63.1-45, -62. Second, the County must follow state procedures and guidelines in organizing its Local Department. *See, e.g.*, Va. Code Ann. § 63.1-26. Third, the Local Board is required to submit its budget to the Commissioner. Va. Code Ann. § 63.1-54. Fourth, local boards of social services have not attained the local, independent status traditionally afforded other local boards. *Compare* Va. Code Ann. § 22.1-71 (code section entitled "School board constitutes body corporate; corporate powers"); *Ram Ditta*, 822 F.2d at 458. Finally, the County contributes no more than 20% of the funding for the Local Department, with the remainder coming from varying combinations of state and federal funds.

In sum, the Local Department's structure and organization and its relationship with the Virginia Department, coupled with the fact that most of the judgment would be paid from state funds, preponderate in favor of the conclusion that the Local Department is, in essence, the states' alter ego, and thus, protected by the Eleventh Amendment from a damage award in a § 1983 action in federal court.[5] *Compare Ram Ditta*, 822 F.2d at 458-59 (Parks & Planning Commission was designated as body corporate, was not required to submit budget to state, was not represented by state attorney general's office,

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[5] Neither party raised nor does the court find any waiver of Eleventh Amendment immunity with regard to the Department or the Board.

and state exercised no control over Commission personnel matters, and, therefore, court found it to be local agency). That conclusion, however, does not end the court's inquiry because the County, nevertheless, may be subject to liability if the Local Board's actions may be fairly attributed to the County.[6]

IV.

A county is subject to municipal liability "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Spell v. McDaniel*, 824 F.2d 1380, 1385 (4th Cir. 1987) (quoting *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978)), *cert. denied*, 484 U.S. 1027 (1988). " '[P]olicymaking authority' implies authority to set and

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[6] The reasoning of *Keller II*, which held that a local department of social services in Maryland was, in effect, an agency of the state and, therefore, immune from suit, provides some support. In *Keller II*, the court of appeals stated:

> [t]he Department is a local department of social services operated by the Maryland Department of Human Resources, an agency of the executive branch of state government. The employees of the Department receive fringe benefits and paychecks from the state and perform their duties subject to state personnel policy. State law and procedure dictate how the Department operates and organizes its programs. Only two percent of the Department's funding comes from the county with the remainder coming from the state and federal governments.

923 F.2d at 32.

implement general goals and programs of municipal government, as opposed to discretionary authority in purely operational aspects of government." *Spell*, 824 F.2d at 1386; *see, e.g., Bennett v. City of Slidell*, 728 F.2d 762, 769 (5th Cir. 1984) ("policymakers act in the place of the governing body in the area of their responsibility"), *cert. denied*, 472 U.S. 1016 (1985). Final authority is "a necessary attribute of 'policymaking authority.' " *Spell*, 824 F.2d at 1386. However, "a municipal agency or official may have final authority to make and implement policy despite a municipality's retention of powers of ultimate control over both policy and policymaker. The question is one of authority-in-fact." *Id.* A single decision by an official exercising such authority is sufficient to subject a municipality to § 1983 liability. *Morrash v. Strobel*, 842 F.2d 64, 67 (4th Cir. 1987) (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80 (1986)).

Though the definition of policymaker is a matter of federal law, the determination of which official or officials fall within this definition is necessarily guided by state law. *Dotson v. Chester*, 937 F.2d 920, 924 (4th Cir. 1991) (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988)). Examining state law, which can include valid local ordinances and regulations, will usually "direct a court to some official or body that has the responsibility for making law or setting policy in any given area of a local government's business." *Id.* From an examination of the control in fact exercised by the County Board through its appointment of Local Board members, the court readily concludes that the Local Board's actions, at least as to personnel matters, are fairly attributable to the County Board and, therefore, the County.

The County maintains that a finding by the court that the Local Department is a state agency for Eleventh Amendment purposes would preclude the County from being held liable because it did not employ the tortfeasors – the board members of the Local Department that discharged Bockes without affording her due process. That argument, however, begs the question. In determining whether the County is liable, the question is not by whom are the tortfeasors employed. Rather, the question is whether the tortfeasors were carrying out official County policy – that is, whether their conduct is fairly attributable to the County. *See Witt v. Harbour*, 508 F. Supp. 378, 380 n.5 (W.D. Va. 1980), *aff'd*, 644 F.2d 883 (4th Cir.), *cert. denied*, 454 U.S. 879 (1981). The court has concluded that because the Local Board exercised authority that it was expressly authorized by law to exercise and because ultimate local control over the Local Board is given to the County Board, the decision to discharge Bockes is fairly attributable to the County.

The structure of the chain of command of the Local Department is somewhat unique. As previously mentioned, the Local Board, which is expressly authorized to hire and fire the local director, is appointed and can be removed by the County Board. At the same time, the Virginia Department retains oversight responsibilities and is authorized to discharge Local Board members as well as Local Department employees who fail to meet state standards. Thus, authority over day-to-day personnel matters is exercised at the local level with ultimate local control resting with the County Board, which is expressly authorized to discharge members of the Local Board at will. *Cf. Dotson*, 937 F.2d at 928-32 (concluding

that sheriff who was designated as state official was acting as county official, and thus, subjected county to § 1983 liability); *Hughes v. Halifax County Sch. Bd.*, 855 F.2d 183, 185 (4th Cir. 1988) (school board, not maintenance supervisor lacking authority to control and supervise personnel, is policymaker for school personnel decisions), *cert. denied*, 488 U.S. 1042 (1989); *Morrash v. Strobel*, 842 F.2d 64, 67-68 (4th Cir. 1987) (city council, not director of public safety, is policymaker, because council retains right to decide how to utilize personnel). Given such a structure, it is not inconsistent to find that the discharge of the local director by the Local Board is an act fairly attributable to the County.[7] On the one hand, the County cannot, in effect, maintain control over the personnel decisions of the Local Department and, on the other hand, escape accountability simply because the Local Department technically can be classified as an agency of the state for Eleventh Amendment purposes. *See Dotson*, 937 F.2d at 928 ("the Sheriff is not always a state employee or always a county employee. He may, on occasion, be both, or sometimes one and sometimes the other. *It all depends on the particular function the Sheriff is performing.*") (emphasis added).

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[7] Additional authority indicates clearly that the Local Board is the policymaker for personnel matters. According to the terms of Volume IA, a publication of the Virginia Department, the Local Board is the "appointing authority" for all personnel actions. Volume IA, Chapter A at 11. Moreover, the Handbook for Local Boards of Social Services notes that the Local Board is a policymaking body. Handbook at 17.

V.

For the above-stated reasons, the court finds that Bockes was entitled to but did not receive procedural due process before she was discharged, that the Eleventh Amendment precludes a judgment award against the Local Department and the Local Board, and that the County is liable for the Local Board's decision to discharge Bockes without affording her procedural due process. In accordance with the jury's verdict, therefore, the court will enter judgment against the County in the amount of $20,000.

ENTER this 29th day of July, 1992.

/s/ Illegible
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
August 23, 1993

No. 92-2047

CA-91-62-A

NANCY BOCKES

Plaintiff -Appellant

v.

BETTYE LOU FIELDS, Individually and as a member and Chairman of the Board of Social Services, Grayson County, Virginia; ROBERT WELLS, Individually and as a member of the Board of Social Services, Grayson County Virginia; DENNIS COOLEY, Individually and as a member and Vice-Chairman of the Board of Social Services, Grayson County, Virginia; DEPARTMENT OF SOCIAL SERVICES, Grayson County, Virginia

Defendants - Appellees

and

COUNTY OF GRAYSON, VIRGINIA

Defendant

No. 92-2072

CA-91-62-A

NANCY BOCKES

Plaintiff - Appellee

v.

COUNTY OF GRAYSON, VIRGINIA

Defendant - Appellant

and

BETTYE LOU FIELDS, Individually and as a member and Chairman of the Board of Social Services, Grayson County, Virginia; ROBERT WELLS, Individually and as a member of the Board of Social Services, Grayson County Virginia; DENNIS COOLEY, Individually and as a member and Vice-Chairman of the Board of Social Services, Grayson County, Virginia; DEPARTMENT OF SOCIAL SERVICES, Grayson County, Virginia

Defendants

On Petition for Rehearing with
Suggestion for Rehearing in Banc

Appellant Bockes' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

JOINT EXHIBIT #2
91-62

COMMONWEALTH OF VIRGINIA

STATE EMPLOYEE PROCEDURES

JUN 20 1990

GRIEVANCE FORM A

EMPLOYEE Nancy Bockes
Name

State Job Classification	Agency
Work Facility	Section
Geographic Location	Work Phone No.

NATURE OF GRIEVANCE I was discharged by the Grayson County Social Services Board on June 8, 1990. The only reason given me was poor employee morale. This reason was pretextual. My job performance was exemplory [sic] in the view of most employees, clients, state and regional social service personnel, and citizens.

DATE GRIEVANCE OCCURRED June 8, 1990 RELIEF REQUESTED Reinstatement to position of Director; back pay; reinstatement and/or compensation for lost benefits; compensation for attorney fees

/s/ Nancy Bockes
Nancy Bockes

MANAGEMENT STEPS

STEP 1 EMPLOYEE-IMMEDIATE SUPERVISOR

DATE OF VERBAL PRESENTATION TO SUPERVISOR _____

DATE OF SUPERVISOR'S VERBAL REPLY _____

DATE FORM A SUBMITTED TO SUPERVISOR 06/20/90
SUPERVISOR'S FIRST STEP REPLY 06/25/90

The Employee serves as Director of the Department of Social Services at the pleasure of the Board. Employee did not keep the Board properly informed and the Board does not think Employee can properly manage the Department within guidelines of Virginia Law and Regulation of the State Dept. of Social Services.

SUPERVISOR'S SIGNATURE /s/ Bettye Lou Fields,
DATE 6-25-90 Chairman

[ ] I consider this grievance concluded and do not wish to advance my grievance to the next step.

EMPLOYEE'S SIGNATURE _____ DATE _____

[X] I do not accept the first step supervisor's reply and wish to advance my grievance to the next step.

[ ] I wish to appeal the first step supervisor's non-grievable reply to the Office of Employee Relations Counselors.

EMPLOYEE'S SIGNATURE _____ DATE SUBMITTED TO NEXT STEP _____

STEP 2 EMPLOYEE-SECOND STEP MANAGER

DATE OF SECOND STEP MEETING _____ MANAGER'S SECOND STEP REPLY _____

_____

_____

_____

_____

MANAGER'S SIGNATURE _____ DATE _____

[ ] I consider this grievance concluded and do not wish to advance my grievance to the next step.

EMPLOYEE'S SIGNATURE _____ DATE _____

[ ] I do not accept the second step manager's reply and wish to advance my grievance to the next step.

[ ] I wish to appeal the second step manager's non-grievable reply to the Office of Employee Relations Counselors.

EMPLOYEE'S SIGNATURE _____ DATE SUBMITTED TO NEXT STEP _____

_____

OERC FORM 01-0185

_____

DENE & DENE
ATTORNEYS AT LAW
138 COURT STREET, N.E.
POST OFFICE BOX 1135
ABINGDON, VIRGINIA 24210
January 28, 1991

LOUIS DENE
HOPE DENE

TELEPHONE (703) 628-8644
FACSIMILE (703) 628-8846

Ms. Nancy Bockes
P.O. Box 434
Independence, VA 24348

Grayson County Department of Social Services
P.O. Box 434
Independence, VA 24348

Mr. William Wells
Grayson County Board of Supervisors
Independence, VA 24348

Department of Personnel and Training
700 East Franklin Street, Suite 910
Richmond, VA 23219

Joseph S. Tate, Esq.
Gwyn, Tate & Tate
Bank of Marion Building
Marion, VA 24354-2599

Kurt J. Pomrenke, Esq.
White, Elliott & Bundy
P.O. Box 8400
Bristol, Virginia 24201

Mr. Roy F. Rose
Box 417
Clintwood, VA 24228

Mr. Harold Williams
P.O. Box 967
Galax, VA 24333

Re: Grayson County Department of Social Services and Nancy Bockes

Enclosed please find your copy of the Panel Decision in the above-referenced matter.

Your cooperation and assistance has been appreciated.

Very truly yours,

/s/ Louis Dene
Louis Dene

LD/ned

DPT Form 01-019

GRIEVANCE FORM B

PANEL DECISION

Grievant Nancy Bockes

Agency Grayson County Department of Social Services

It has been determined by the agency head or the Circuit Court that this grievance qualifies for a panel hearing.

Panel Chairman Louis Dene

Date January 18, 1991

Place of Hearing Grayson County Courthouse

Date of Hearing January 9, 10, 11, 1991

Panel Members:

1. Employee Selection Roy Rose
2. Agency Selection Harold Williams
3. Third Member Louis Dene

Issue Whether the discharge of grievant, Nancy Bockes, was proper and in accord with the applicable rules, regulations and policies.

Panel Decision Discharge was not in accord with the applicable policies, rules and regulations set forth in Volume IA of the policies and procedure manual. Reinstatement with one-half back pay, excluding any and all monies earned from wages, vacation pay, sick leave pay, and any other source. Grievant is to receive any salary increase she had [sic] would have received as though she had been working for the entire year of 1990; grievant's

benefits will accrue for 1991 without any interruption or break in service. Social Services shall make the appropriate contributions to greivant's [sic] pension limited to the monies that the agency pays the grievant. Panel recommends the Board of Social Services meet with the grievant and clearly set forth the expectations of that department, and it is strongly recommended that the Board and the members deal directly with the Director when information is needed from that Agency.

Reason for Panel Decision _____

The evidence presented to the panel shows the Board of Social Services of Grayson County did not follow the procedures outlined in Volume IA, and there was not just cause for discharge.

/s/ Louis Dene
Panel Chairman

/s/ Roy F. Rose
Panel Member

/s/ Harold L. Williams
Panel Member

Panel to Record the Vote [ ] 3-0
[x] 2-1

Note: Panel Chairman shall transmit this decision to the agency head, the employee, and the Department of Personnel and Training within fifteen (15) work days following conclusion of the hearing. The agency head shall transmit copies of this decision to appropriate supervisors within three (3) work days following receipt of the decision.

White Elliott & Bundy

ATTORNEYS AT LAW

Dominion Bank Building
601 State Street, Suite 600
Post Office Box 8400
Bristol, VA-TN 24203

Telephone 703-466-8400
Fax 703-466-8161

June 5, 1992

Jackson S. White, Jr.
James Wm. Elliott, Jr.†
John S. Bundy
Mark M. Lawson
Howard C. McElroy
James R. Hodges
Kurt J. Pomrenke
Rick J. Bearfield*
Amelia L. Bland
James E. Green
Pamela Meade Sargent
Mark R. Graham
Steven R. Minor
D. Jeffrey Coale
Steven T. Clark
Kyle P. Macione†

†Admitted in Tennessee and Virginia
*Admitted in Tennesee

ABINGDON OFFICE
The Dominion Center
330 Cummings Street
P.O. Box 429
Abingdon, VA 24210
Telephone 703-628-9515
Fax 703-628-7808

JOHNSON CITY OFFICE
Suite 18 Princeton Square
207 Princeton Road
P.O. Box 4210 CRS
Johnson City, TN 37602
Telephone 615-282-1006
Fax 615-282-3081

Thomas C. Phillips, Jr.
Of Counsel

The Hon. Samuel G. Wilson, Judge
United States District Court
P.O. Box 749
Abingdon, VA 24210

Re: Bockes v. Grayson County Board of Social Services, et. al.
Our File No. 5355-HG-1

Dear Judge Wilson:

Please find enclosed two documents which Bob Ward and I have stipulated to and which hopefully address some of the questions you raised. The first document is a letter dated June 2, 1992, from LaVaun Reedy, Office Manager for the Grayson County Department of Social Services, advising Mr. Ward that the premium paid by the local department for the public officials liability policy written by the Division of Risk Management is comprised of 80 percent state funds and 20 percent local funds.

The second document is a letter dated June 4, 1992, from Robert C. Vogt, Program Manager, Political Subdivisions, Division of Risk Management, in which he provides some explanatory information concerning the public officials liability self insurance plan.

I have filed today with the Clerk a supplemental memorandum regarding our opinion of the significance to this case of the Division of Risk Management Public Officials Liability Insurance Program.

Should you need any additional information, please advise. Mr. Ward has not previously seen our supplemental memorandum, and may desire time to respond.

Sincerely,

/s/ Kurt Pomrenke
Kurt J. Pomrenke

Encs.

c: Mr. Robert V. Ward (w/o enclosure)
Ms. Nancy Bockes (w/o enclosure)

Grayson County Department of Social Services

P.O. Box 434

Independence, Va. 24348

[LOGO]
SOCIAL SERVICES TO
CHILDREN AND ADULTS

703-773-2452
703-236-9541

PUBLIC
ASSISTANCE
FOOD STAMPS
MEDICAID

June 2, 1992

Mr. Robert V. Ward
Suite 300
Executive Plaza
510 Cumberland St.
P.O. Box 1809
Bristol, VA 24203-1809

Dear Mr. Ward:

Mr. Dennis Cooley requested I send you the information regarding the Division of Risk Management. This is reimbursed at 80% state and 20% local. He stated Judge Wilson needs this as soon as possible. Would you please see that he is informed.

If I can be of further assistance, please advise.

Sincerely,

/s/ LaVaun H. Reedy
(Mrs.) LaVaun H. Reedy
Office Manager

cc: Dennis Cooley

LOGO

COMMONWEALTH of VIRGINIA

DEPARTMENT OF GENERAL SERVICES

June 4, 1992

DIVISION OF RISK MANAGEMENT
JAMES MADISON BUILDING
4TH FLOOR
109 GOVERNOR STREET
RICHMOND, VIRGINIA 23219
(804) 786-5968
FAX (804) 371-8400
VOICE/TDD (804) 786-6152

TO WHOM IT MAY CONCERN

PUBLIC OFFICIALS LIABILITY SELF-INSURANCE PLAN (POLSIP)

I am employed by the Commonwealth of Virginia, Department of General Services, Division of Risk Management (DRM).

Under Section 2.1-526.8:1, of the code Virginia, DRM acts as the administrator and trustee for the POLSIP.

The POLSIP is essentially a group self-insurance that is non-assessable. All political subdivisions in Virginia are eligible to participate in the Plan. Such participation is voluntary.

DRM sets the rates/cost for participation. For Social Service Departments; a rate is set based on the size of the agency. Agencies, statewide, have been categorized into several different groups based on the size of population served. The larger the population served the larger the cost.

The agency, upon a decision to participate, makes payment directly to DRM. The payment is made using a combination of state and local funds. The State pays the majority of the costs. The states share of the costs is 80% with the locality funding the remaining 20%.

Any judgements paid under the POLSIP come directly from the funds that have been paid in for each type of political subdivision.

The funds paid into the Plan are held in a single self-insurance trust fund, with the assets invested on the funds behalf by the Treasurer of Virginia.

Any check making payment out of the Trust Fund account is signed by the Treasurer of Virginia. The account is held in the name of the Commonwealth.

I can be reached at (800) 678-4924, extension 5-4616, if further information is needed.

Sincerely,

/s/ Robert C. Vogt
Robert C. Vogt
Program Manager
Political Subdivisions

INTRODUCTION

The material contained in the Local Personnel Administrative Manual is a comprehensive text comprised of the policies, administrative rules and procedures to be used in the administration of local welfare/social service personnel. This administrative manual provides the basis for the State Personnel System applicable to all local social service departments.

The State Board of Social Services establishes and maintains the standards and policies that provide the foundation of the Local Personnel System. Administrative rules and procedures for implementation of the State Board policies are developed by the State Department of Social Services. The Commissioner of the State Department of Social Services is responsible for making certain that the personnel policies, administrative rules and procedures are properly maintained and administered. He must also ensure that local welfare/social services departments comply with the provisions of the personnel plan. Local boards of welfare/social services must adopt the state policies or in lieu of these, under the conditions set forth in the State Personnel Plan, request approval to adopt local jurisdictional personnel policies. The intent of the

law, the State Board policies and the rules for administration of the personnel plan, is to provide for the maintenance of an adequate qualified staff essential to the effective operation of the social service programs.

This document provides the policies, rules and procedures for the operation of a Personnel System applicable to local welfare/social service employees. It is divided into the following six Chapters. Chapters B, C, and D generally conform to the organizational structure of the State Department of Social Services, Office of Personnel:

Chapter A General Overview of the Local Personnel Plan

Chapter B Classification and Compensation

Chapter C Personnel Management including all aspects of Employment and Employee Benefits

Chapter D Employee Relations Management

Chapter E Jurisdiction-Wide Personnel Systems

Chapter F Local Agency Personnel System (LAPS)

1. STATE BOARD OF SOCIAL SERVICES

In accordance with federal and State law, the State Board of Social Services has established personnel policies which are the basis for a comprehensive Local Personnel System applicable to employees of local welfare/social services departments. The personnel system promulgated by the State Board is in keeping with the Federal Merit Principles, and federal and State law. The State Board is ultimately responsible for maintenance of the system and monitoring of its use by local agencies.

All local departments of welfare/social services must utilize the personnel system established by the Board. However, there are provisions throughout the plan that allow local agencies to request approval for local jurisdictional policies in lieu of the State policy. Under specific conditions, the State Board has provided for inclusion of local department of welfare/social services employees in a comprehensive local jurisdiction-wide personnel plan. Prior approval of the jurisdiction-wide plan is required and continued approval is contingent upon compliance with the original agreement and conformity with the policies in the Local Personnel Plan. Refer to Chapter E for more information.

2. RESPONSIBILITY FOR PERSONNEL ADMINISTRATION

State Board Policy

The Virginia Department of Social Services is responsible for providing a personnel system encompassing all aspects of personnel; selection, classification, compensation, administration, and employee relations which complies with appropriate federal and State laws and regulations.

a. Federal Requirements

The Federal Standards for a Merit System of Personnel Administration, Section 5 CFR, Part 900, subpart F, (b) states that, "Certain Federal grant programs, require, as a condition of eligibility, that State and local agencies that receive grants establish merit personnel systems for their personnel engaged in administration of the grant-aided program. These merit personnel systems are in some cases required by specific federal grant statutes and in other cases are required by

regulations of the federal grantor agencies. Title II of the Act [Intergovernmental Personnel Act of 1970, as amended] gives the U. S. Office of Personnel Management authority to prescribe standards for these federally required merit personnel standards."

1) State Board Policy

The Department of Social Services is committed to providing a personnel system based upon merit and fitness applicable to all local welfare/social service agencies in Virginia which complies with the federal regulations set forth in the "Federal Standards for a Merit System of Personnel Administration," 5 CFR, Part 900, subpart F.

2) The Six Merit Principles

The Federal Standards for a Merit System of Personnel Administration contain six merit principles that apply to all systems of personnel administration that must comply with the standards. The six principles are as follows:

a) recruiting, selecting and advancing employees on the basis of their relative ability, knowledge and skills, including open consideration of qualified applicants for initial appointment;

b) providing equitable and adequate compensation;

c) training employees, as needed, to assure high quality performance;

d) retaining employees on the basis of the adequacy of their performance, correcting inadequate performance, and separating

employees whose inadequate performance cannot be corrected;

e) assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, national origin, sex, religious creed, age or handicap and with proper regard for their privacy and constitutional rights as citizens. This "fair treatment" principle includes compliance with the federal equal employment opportunity and nondiscrimination laws; and

f) assuring that employees are protected against coercion for partisan political purposes and are prohibited from using their official authority for the purpose of interferring [sic] with or affecting the result of an election or a nomination for office.

b. State Requirements

The Code of Virginia, Section 63.1-26 delegates the State Board authority for establishing personnel policies which are applicable to employees of local welfare/social service departments.

1) State Board Policy

The Virginia Department of Social Services is responsible for establishment and maintenance of administrative policies and procedures governing personnel administration in the Virginia social services program. It is the responsibility of the State Board of Social Services to establish entrance and performance standards for personnel administration in accordance with the provisions contained in Section 63.1-26 of the Code of Virginia.

2) Code of Virginia Reference

a) The standards in Section 63.1-26 include such rules and regulations as may be embraced in the development of a system of personnel administration meeting requirements of the federal Department of Health, and Human Services (HHS) under appropriate federal legislation relating to programs administered by the Board; provided,

* * *

LOGO

COMMONWEALTH OF VIRGINIA

DEPARTMENT OF SOCIAL SERVICES

November 14, 1986

TO: Local Directors/Superintendents

SUBJECT: PUBLIC OFFICIALS LIABILITY SELF INSURANCE PLAN

You were recently mailed information from the State's Division of Risk Management concerning the above. If your agency is not presently covered by Professional Liability Insurance, you are encouraged to make immediate application to the Office of Risk Management for such coverage as is now being offered.

The Department of Social Services will reimburse 80% of the premium cost for this insurance. This Department will not participate in reimbursement of any deductible amounts that may be charged under policy terms of the insurance.

If your agency is currently covered by your local city or county Public Officials and Employees' Legal Liability Insurance policy, you will note from the Division of Risk Management's release that local welfare/social services agencies will *not* be insured in any policy Risk Management may issue in the future to your local governing body. This prohibition also seems to be applicable to most private insurance carriers.

Now that the Division of Risk Management has developed and published its plan to offer Public Officials Liability Self Insurance to all local welfare/social services agencies that make application, we see no reason for any

local agency not to have adequate financial protection and legal services in the event a professional liability claim is made against any welfare/social services agency or its employees.

If you need assistance of any kind in matters relating to professional liability insurance, please contact Mr. S. P. Hair, Director, Division of Administration, telephone (804) 281-9206.

/s/ William L. Lukhard
William L. Lukhard

cc: Regional Directors

LOGO
COMMONWEALTH of VIRGINIA
DEPARTMENT OF GENERAL SERVICES

July 8, 1993

DIVISION OF RISK MANAGEMENT
JAMES MADISON BUILDING
4TH FLOOR
109 GOVERNOR STREET
RICHMOND, VIRGINIA 23219
(804) 786-5968
FAX (804) 371-8400
VOICE/TDD (804) 786-6152

Daniel R. Bieger, Esq.
Copeland, Molinary & Bieger, P.C.
212 West Valley St.
P.O. Box 1296
Richmond, VA 24210

Re: Clyde and Janice Quick

Dear Mr. Bieger:

This letter will acknowledge receipt of your fax sent to the Office of the Attorney General. Please be advised that this office now handles claims made against agencies of the Commonwealth.

We are of the opinion that the Buchanan County Department of Social Services is not a State agency for the purposes of the Tort Claims Act. We will, however, retain your letter for whatever legal effect it may have.

Sincerely,

/s/ Lynne Noyes
Lynne E. Noyes
Claims Management
Specialist

cc. Kurt J. Pomrenke, Esq.
Bill Jones

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA
Abingdon Division

NANCY BOCKES, Plaintiff, vs BETTYE L. FIELDS, individually and as a Member and Chairman of the Board of Social Services, Grayson County, Virginia, et al., Defendants.	Civil Action No. 91-62-A (Filed Jan. 8, 1993) 9:45 a.m. February 5, 1992 Abingdon, Virginia

PARTIAL TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE SAMUEL G. WILSON
UNITED STATES DISTRICT JUDGE, and a jury

APPEARANCES:

KURT J. POMRENKE, Esquire
White, Elliott & Bundy
P.O. Box 8400
Bristol, Virginia 24203-8400
Counsel for the Plaintiff.

ROBERT V. WARD, Esquire
P.O. Box 1809
Bristol, Virginia 24203-1809
Counsel for the Defendants.

Proceedings recorded by mechanical stenography, transcript produced by Reporter.

BRIDGET A. DICKERT
UNITED STATES COURT REPORTER
P.O. BOX 749
ABINGDON, VIRGINIA 24210
(703) 628-2549

[Robert Wells on Direct Examination by Robert Ward]

* * *

[p. 78] Q . . . Did you reach a point in time where you reached a decision you didn't think was in the best interest of the board for this lady to be a director?

A That's exactly right.

Q Did you have a conversation with these other two members about that?

A Yes, I did.

Q Did you come upon an agreed course of action?

A Yes, sir.

Q As a result of that agreed course of action did you, did you consult an attorney in Marion?

A Yes, I did?

A [sic] About when was that?

A Sometime in May, I think.

[p. 79] Q 1990?

A 1990.

Q All right. On the first occasion with the attorney did all three members go?

A No, sir, just myself.

Q Did you discuss with the attorney the problems?

A Yes, sir.

Q How many times were you present at meetings with your lawyer?

A By myself or with the board?

Q Both. How many times by yourself –

A I think I met with Joe Tate twice, the first time to discuss with him, you know, about the information that I had, or if we were correct in what we were trying to do, to advise us, and then one other time I think I stopped by there and dropped off some more statements people had given me, and then one time we three met together.

Q All right. Did you tell Mr. Tate that you wanted to fire Mrs. Bockes?

A No, I don't think I said it that way. I said, "What can we do?" I said, "Can we fire her? We need advice."

Q Were you told that you had to comply with the provisions of 1-A, manual 1-A?

[p. 80] A No, sir.

Q Did you, as a board, decide to terminate Mrs. Bockes from her employment?

A Yes, sir.

Q Did you follow Mr. Tate's advice in doing that?

A Yes, sir.

Q And what advice was that? What specifically did Mr. Tate tell you you had to do?

A To dismiss her, to tell her that we had lost faith in her ability to run that agency.

Q Did he give you any instructions as to whether you should say anything else?

A He told us to keep our mouths shut.

Q Did you follow his instructions?

A Yes, sir.

Q Did you discuss with him the provisions of the code section that said the superintendent serves at the pleasure of the board? Did you discuss that with him?

A Yes, sir. I asked him specifically about that.

Q Did you know what it meant when it said subject to the provisions of the merit system?

A No, sir, I did not.

Q Did you rely on his advice to comply with what that meant?

[p. 81] A Yes, sir.

Q The procedure that happened on June 8, 1990, was that done in accordance with your attorney's instructions?

A Yes, it was.

* * *

[Dennis Cooley on Direct Examination by Robert Ward]

* * *

[p. 88] Q Did you reach a point when you ~~felt~~ it was in the best interests of the Grayson County Department of Social Services to terminate Mrs. Bockes from her position?

A Yes, sir.

Q When was that?

A I guess probably May, something to that effect.

Q Do you have any written notes to recall specific dates?

A No.

Q Did you, did you have conversations with Mrs. Fields and Mr. Wells about this?

A Yes, sir.

Q Was there any agreement to contact an attorney?

A Yes, sir.

Q Before any board action was taken on June 8th of 1990 did you, yourself, also meet with an attorney?

A Yes, sir.

Q Who was present?

A The other board members.

Q Okay. Was, at that point in time was a decision made that you could fire Mrs. Bockes by the procedure used, June 8th?

[p. 89] A Yes, sir.

Q What were your instructions?

A To terminate.

Q What were your instructions as to how?

A That's what we had to do, simply termination, since she was an at will employee.

Q Who used the term at will employee?

A Pleasure of the board.

Q What I'm asking you, were those the attorney's words or were they your words?

A Oh, I'm sorry. Yes, sir. The attorney's words.

Q All right. If you had been told that you had to comply with the provisions of 1-A by your attorney would you have done that?

A Yes, sir.

Q At the time that the action was taken on June 8, 1990 did you believe you were in full compliance with the law?

A Yes, sir.

* * *

[Bettye Lou Fields on Direct Examination by Robert Ward]

* * *

[p. 94] Q Did you reach a point where you felt it was in the best interests of the Department of Social Services of Grayson County to terminate Mrs. Bockes and replace her with someone else?

A Yes, I did.

Q Was that an easy thing to do?

A No, it was not.

Q When you went on the board did you take an oath?

A Yes, sir.

Q Did you discuss this with Mr. Wells and Mrs. Cooley?

A Yes, I did.

Q Did there come to be an agreement that something had to be done?

A Yes.

Q As a result of that were you present for the meeting with the attorney?

A Yes, one meeting with the attorney, the three of us.

Q Pardon?

A The three of us met with the attorney.

[p. 95] Q Okay. At that meeting were you told you had to comply with the provisions of 1-A?

A No, sir.

Q At that meeting were you told, at least given 1-A, the appropriate procedure for terminating Mrs. Bockes?

A Yes, we were told that to just tell her that we had lost confidence in her ability to lead, to say nothing else, to give no other reasons, that she was, that she would,

she worked at the pleasure of the Board, and that meant we didn't even have to have a reason. We certainly wouldn't – well, anyway, that's what we did.

Q Did you follow his advice?

A Yes.

Q When you were asked to name specifics did you follow his advice and not say anything?

A Yes, sir.

Q If you had been told to comply with provisions of 1-A by the attorney would you have done that?

A Yes, sir.

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

NANCY BOCKES, *Plaintiff*	)	CIVIL ACTION NO. 91-0062-A
v.	)	
BETTYE LOU FIELDS, et al, *Defendants*	)	

AFFIDAVIT

I, Nancy Bockes, hereby swear and affirm that the following statements are true:

1. I am employed as the director of the Grayson County Department of Social Services. The employees of our agency and myself always have been considered to be local employees of a local agency, and not state employees or employees of a state agency.

2. Our Department of Social Services employees are covered by Grayson County's Blue Cross/Blue Shield group health insurance policy. This is the same policy that all county employees, with the possible exception of the sheriff's department, participate in. I am unaware of any provisions in either the state code or state board policy which would allow employees of a local social services agency to participate in the state employee group health insurance policy. Eighty percent of the cost of the premiums for the health insurance policy are borne by the state, and twenty percent are paid by Grayson County. Grayson County pays the premiums for our

employees, and then receives eighty percent reimbursement from the state of Virginia.

3. The Grayson Department of Social Services rents office space from Grayson County, and our office is located in the basement of the Grayson County Courthouse. The rent is 80/20 money. (eighty percent paid by the state; twenty percent by the county).

4. Room and board expenses for our foster care program is 50/50 money (fifty percent paid by the state; fifty percent by the county). Foster care services is paid with 80/20 money; however, when that money is exhausted, the ratio then becomes 50/50. We almost always run out of our state allotment, and are forced to use 50/50 money.

5. The general relief program is solely a local option program. That is, our board of social services in Grayson County has determined that we will offer the general relief program. This program is totally discretionary on the part of the local board and is not mandated by the state of Virginia. The ratio for this program is approximately 62/38 (sixty-two percent paid by the state; thirty-eight percent by the county). It is my understanding that most counties have dropped their general relief program since it is a local option program.

6. Our social services board members are paid a $30.00 salary per month for attending our board meetings. This money is local only money, meaning there is no state reimbursement ("local" money means funds allocated to us by the Grayson County Board of Supervisors). The board members' mileage expenses are reimbursed 80/20.

7. Our commodity program (the distribution of food products to the needy) is funded with local only money, and then we are reimbursed by the federal government. No state money is used for this program.

8. Our local board of social services is the hiring authority for our department. In interviewing prospective employees for our department, our board always informs those applicants that if hired they would be considered the same as any other county employee.

9. The Grayson County Social Services Board voted to allow our employees to participate in the state grievance procedure, as opposed to participating in a local grievance procedure.

10. The Grayson County Board of Supervisors, in the past, decided that all county employees, including the Department of Social Services employees, would be covered by the state employee retirement fund, and not a local plan.

11. The employees of the Grayson County Department of Social Services do not receive raises unless the Grayson County Board of Social Services approve such raises. The Grayson County Department of Social Services employee do not receive the same raises that state employees throughout Virginia receive. Our raises are totally dependent upon the action of our local board of social services.

12. Our department has five cars which are titled in our local agency's name and which have local license plates. Our cars are serviced at the Grayson County

garage, and we purchase gasoline from the county. Conversely, state vehicles have state license plates, are serviced at the Virginia Department of Transportation garage, and purchase their gasoline from the Department of Transportation.

13. On several occasions the Grayson County Administrator, Don Young, and other county officials have borrowed our automobiles, particularly our van, for county use.

14. The Chairman of the Grayson County Board of Social Services signs all warrant registers which are then sent to the county treasurer for the issuance of payroll checks. There is no state involvement in this procedure.

15. The County Treasurer signs and issues the payroll checks for our social services employees. The eighty percent state reimbursement for these costs is paid directly to the County Treasurer.

16. The County Treasurer handles all of our department's accounts and keeps track of all of our books. Our agency keeps no money; the County Treasurer handles everything. The Department of Social Services can write checks, but the County Treasurer must sign them.

17. The cost for my grievance procedure, which would have included attorney fees, court reporter fees, and the administrative hearing chairman's fees, was paid with 100 percent local money. No state funds were approved or appropriated for this expense.

18. The Board of Supervisors for Grayson County must approve all new programs or new employees which would require the expenditure of twenty percent local

money. Without that approval from the County, we could not implement new programs or hire additional employees. Thus, the Board of Supervisors directly controls whether we implement new programs or hire additional employees.

19. Every Grayson County employee, including employees of the Department of Social Services, pay five percent of their salary into the Virginia Retirement System. Conversely, the state of Virginia pays this five percent share for state employees. Those state employees pay nothing out of their own paychecks.

20. When the regular County audit is performed, the Grayson Department of Social Services is audited at the same time and by the same auditors who audit every other county department. My work performance as director of this agency is evaluated on a regular basis by the Grayson Board of Social Services. No one from the State Department of Social Services or the Western Region Department of Social Services participates in my evaluations.

21. I recently had to request an additional allocation from the Grayson County Board of Supervisors in the approximate amount of $12,500.00, which was the local share (50%) to fund necessary programs in foster care, ADC foster care and subsidized adoption, through the end of the fiscal year. If the county doesn't give us those funds, we cannot obtain the 80% state money (approximately $69,000.00).

22. If there is no insurance coverage, it is my understanding that any civil judgments awarded against the Board of Social Services or the Grayson Department of

Social Services would have to be paid out of local only money, and is not reimbursed by the state.

/s/ Nancy Bockes
Nancy Bockes

STATE OF VIRGINIA
COUNTY OF WILLIAMSBURG

Personally appeared before me, a Notary Public for State and County aforesaid, Nancy Bockes, who, upon being duly sworn, stated that the foregoing is true and correct to the best of her knowledge and belief.

WITNESS my signature and seal this 12th day of March, 1992.

/s/ Barbara J. Thompson
Notary Public whose
commission expires on
December 31, 1994

[SEAL]